

CHARLOTTE DOYLE

**The Revival of Pay Equity in New Zealand: the pursuit of a
social goal through law reform**

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Abstract

The Equal Pay Act 1972 was passed as a piece of social law reform intended to eradicate discrimination in wages between men and women. For over forty years since the passing of the Act, there has been little progress on the implementation of pay equity in New Zealand and it continues to be an important legal battleground for the achievement of gender equality in employment. The successes and failures of achieving law reform around pay equity in New Zealand indicate that the institutions responsible for the instigation and implementation of such reform are each influenced by broader socio-economic and political climates. The Equal Pay Act 1972 has long been understood to be limited to assessments of equal pay for the same work, despite apparent provision for assessments of equal pay for work of equal value in the Act. Through the use of a purposive approach, recent judicial treatment of the Equal Pay Act 1972 by the Court of Appeal has departed from previous understandings of the Act by finding it extends to assessments of equal pay for work of equal value. This paper considers how this interpretation has generated a renewed effort on the part of the Government for reform around pay equity in light of the history of the Act. It argues that in moving forward, the choice between mechanisms of law reform is not clear cut. Both strong legislation and a responsive judiciary are required to work in tandem to achieve a social goal such as pay equity.

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I Introduction

“The body of law resembles nothing so much as an amoeba: constantly moving, adapting, expanding and contracting. The needs for adaptation and expansion flow from the changing nature of society and the stimulus of economic, sociological and political pressures”

– Hon Justice Michael Kirby¹

New Zealand has earned an international reputation of being a progressive leader on issues of gender equality. According to measures of economic participation, education and political empowerment, the levels of differentiation between men and women are steadily decreasing.² Yet despite these efforts, a marked gender pay gap persists in New Zealand and continues to confront the ways that society accords economic value to work performed by women.³

The reasons for a lingering gap are diverse and complex, extending beyond men and women earning different wages for performing the same work. Causes of gendered inequality are numerous and often deeply rooted in historical socio-economic trends and developments. While equal pay for women and men who perform the same work has largely been achieved in New Zealand, occupations predominantly performed by women continue to be paid at significantly lower rates than jobs predominated by men. This occupational segregation entrenches pay inequality in New Zealand’s workforce and is estimated to contribute to 30 percent of the total gender pay gap.⁴

¹ Hon Justice Michael Kirby, “The Politics of Achieving Law Reform” (1987-1988) 11 *Adel L Rev* 315 at 318.

² World Economic Forum *Global Gender Gap Index Report 2015* (November 2015).

³ Statistics New Zealand *Labour Market Statistics (Income): June 2016 quarter* (7 October 2016) - In 2016 the gender pay gap stood at 12 percent, compared with 9.9 percent in 2014.

⁴ Statistics New Zealand *Women at work: 1991-2013* (2015) (online, available at www.stats.govt.nz) at 7; Ministry for Women “Occupational segregation” <<http://women.govt.nz/work-skills/paid-and-unpaid-work/occupational-segregation>>.

The principle of ‘equal pay for work of equal value’ or ‘pay equity’ seeks to rectify this differentiation by adjusting the valuation of women’s work to match that of equivalent professions dominated by men. It differs from ‘equal pay’ which eradicates discrimination between men and women who are performing the same work and typically under an individual employer. Equal pay for work of equal value has long been recognised internationally as a fundamental human right.⁵ New Zealand has equal pay legislation in place, however domestic implementation of pay equity is yet to be realised. This has frequently been perceived as a human rights failure and has become one of the most important legal battlegrounds for achieving gender equality.⁶

Since the 1960s, when perceptions regarding the role of women in society started to shift, law reform has been pursued as a mechanism to obtain equal rights in pay for men and women in New Zealand.⁷ The Equal Pay Act 1972 is one such legislative tool. The Act was passed to remove and prevent discrimination on the basis of gender in the rates of remuneration for men and women in paid employment in the private sector.⁸ Equal pay is broadly defined in the Act as a rate of remuneration for work where there is no element of differentiation between employees based on their gender.⁹ At the time of its passing, the Act was heralded as a piece of ground-breaking social legislation.¹⁰ However, the social law reform ambitions of the Act regarding equal pay for work of equal value failed to be comprehensively realised for the subsequent 40 years after its enactment, with very little

⁵ The Universal Declaration of Human Rights states that everyone has the right to equal pay for work of equal value. It is also a founding principle of the International Labour Organisation and protected by the International Covenant on Economic, Social and Cultural Rights. New Zealand is a party to all of these agreements.

⁶ Dr Jackie Blue, Equal Employment Opportunities Commissioner “New Horizons for Women Trust Award Ceremony” (Premier House Wellington, Women Trust Award Ceremony, July 23 2016). <<https://www.hrc.co.nz/news/speech-new-horizons-women-trust-award-ceremony/>>

⁷ Margaret Wilson “Impact of Women’s Political Leadership on Democracy and Development in New Zealand” in Farah Deeba Chowdhury and others *The Impact of Women’s Political Leadership on Democracy and Development: Case Studies from the Commonwealth* (Commonwealth Secretariat, London, 2013) 39 at 55.

⁸ Ten years previously the Government Service Equal Pay Act 1960 had been passed to address unequal pay in the public sector.

⁹ Equal Pay Act 1972, s 2.

¹⁰ (29 August 1972) 380 NZPD 2180) as cited in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157 at [86].

interpretation of its scope and appropriate implementation.¹¹ Due to subsequent Labour and National governments being unwilling to take further action to achieve implementation of the principle, the issue of pay equity has been absent from governmental policy in recent decades.

In 2014 the Court of Appeal in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Incorporated (Terranova)* sought to “reactivate” the Equal Pay Act 1972 after this longstanding dormancy.¹² The conclusion of the Court that the Act included the provision of equal pay for work of equal value radically departed from previous understandings of the Act’s scope. As a result, the decision had significant implications for the pay equity campaign by reconceptualising the issue of pay equity and breaking the Government’s long-standing silence. A new opportunity for meaningful reform on pay equity had been created.

In this research paper, the history of law reform on pay equity in New Zealand is considered through looking closely at the introduction of the Equal Pay Act 1972 and what social goals were intended by its enactment. The following dismissive judicial treatment of the Act is investigated to discern why there was a lack of progression in the implementation of pay equity despite efforts for change on the part of the Government. Subsequent efforts for further legislative reform that would clarify the requirement for pay equity in New Zealand were also hindered. The financial and regulatory investment required by pay equity became incompatible with sweeping reforms to New Zealand’s labour framework. This absence of progress on pay equity in both the courts and government policy is contextualised by looking at the broader socio-economic and political concerns that shaped attitudes towards the importance accorded to the achievement of pay equity.

¹¹ *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Limited* [2013] NZEmpC 157 at [95].

¹² *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Incorporated* [2014] NZCA 516 at [1].

This paper then analyses the revival of the issue of pay equity in New Zealand by the *Terranova* case and how the judicial treatment of the Act by the Court of Appeal has transformed the issue of pay equity from a political issue into a tangible legal problem. The conditions that have fostered the radical departure from previous understandings of the Act will be explored, particularly the broad shift to a rights-based discourse which favours anti-discrimination in employment over economic concerns.

The final section of this paper will consider where responsibility lies for moving forward on pay equity and the ongoing challenges involved. An assessment of the treatment of pay equity in New Zealand demonstrates that the success of legislative reform which aims to rectify a social issue is contingent on the alignment of a wealth of other considerations. The current opportunity to implement effective legal reform will inevitably be similarly determined by contemporary political concerns and climates. The paper will consider how the interplay between the courts and government as institutions responsible for the creation and realisation of law reform on pay equity determines the likelihood of its success. It will conclude by considering that, while law reform can be regarded as a limited instrument of social change, it continues to play a fundamental role.¹³

II Conceptualising Pay Equity

A What is pay equity?

The terms ‘equal pay for work of equal value’ and ‘pay equity’ are used interchangeably to describe a method of valuing work that is predominantly performed by women. It is an objective assessment which compares the skills, training and responsibility of different

¹³ Margaret Davies “Legal theory and law reform: some mainstream and critical approaches” (2003) 28 *Alt LJ* 168 at 168.

occupations performed by men and women.¹⁴ Women would receive the same pay as men for performing a comparable job.¹⁵ This differs from ‘equal pay’ which compares the rates of pay of men and women performing the same work.

Pay equity targets occupational segregation as a root cause of a gender pay gap.¹⁶ The most common occupations for women continue to be those which were traditionally associated with domestic and unpaid roles.¹⁷ These include caring, cleaning, teaching and healthcare positions. These roles are typically described as ‘women’s work’ because the associated skills are assumed to ‘come naturally’ to women.¹⁸ They are positions that continue to be paid at lower rates than occupations predominantly performed by men such as protective services (police and fire services), manual trades and technical professions.¹⁹ The differential largely reflects entrenched cultural perceptions regarding the relationship between skills and economic productivity.²⁰

Pay equity seeks to eradicate the differential by objectively evaluating the social and economic value of comparable female and male occupations.²¹ For example, a frequent comparison is made between nursing, a female-dominated profession, and policing (male-dominated).²² Pay differentiation would be justified according to agreed criteria rather than predicated on social biases amounting to discrimination on the basis of gender.²³ As a result, the principle is broader than equal pay for equal work as it targets indirect discrimination and on a horizontal basis across occupations.²⁴

¹⁴ International Labour Organisation *Time for equality at work* (Report I (B)), published 91st ILC Session, 2003) at 48.

¹⁵ Ministry of Women’s Affairs *Next Steps Towards Pay Equity: A Background Paper on equal pay for work of equal value* (September 2002) at 4.

¹⁶ Linda Hill “Equal pay for work of equal value: making human rights and employment rights laws work together” (2004) 21 *Social Policy Journal of New Zealand* 1 at 5.

¹⁷ Sandra Fredman “Reforming Equal Pay Laws” (2008) 37 *ILJ* 195 at 195.

¹⁸ May Cornish and Fay Faraday *Achieving Pay and Employment Equity for Women – Human Rights and Business/Development Imperatives* (Paper for the Pay and Employment Equity for Women Conference, June 2004) at 2.

¹⁹ Statistics New Zealand, above n 4, at 11.

²⁰ Statistics New Zealand, above n 4, at 8.

²¹ May Cornish and Fay Faraday, above n 18, at 2.

²² Ministry of Women’s Affairs, above n 15, at 16.

²³ Linda Hill, above n 16, at 5.

²⁴ International Labour Organisation, above n 14, at 44.

B Occupational segregation in New Zealand

Occupational segregation by gender continues to be a defining feature of New Zealand's labour market.²⁵ Census data from 1991-2013 reveals that women are over-represented in lower paid positions in the healthcare, education and social assistance industries despite being more likely to have higher formal qualifications than men.²⁶ Almost half of the labour workforce is concentrated in occupations where 70 percent or more of the employees are of the same gender.²⁷ This perpetual segregation based on the type of occupation is estimated to account for approximately 30 percent of the gender pay gap.²⁸

Occupational segregation has a significant societal impact. To achieve the same occupational distribution for men and women would require 44 percent of women to change their profession.²⁹ The principle of equal pay for work of equal value avoids this obstacle by rectifying historical biases within the status quo by recognising occupational segregation. Research has also indicated that a lack of pay equity has a detrimental economic impact on overall labour productivity and efficiency.³⁰ Explicit acknowledgement of such segregation in equal pay legislation is generally lacking and presents a significant impediment to the achievement of pay equity.³¹

C Pay equity as a human right

Equal pay is largely rationalised according to rights-based social justice principles. Equal pay is a core part of gender equality.³² Discrimination in workplaces on the basis of gender amounts to a breach of this right by creating socio-economic inequality between

²⁵ Statistics New Zealand, above n 4, at 7.

²⁶ Statistics New Zealand, above n 4, at 7.

²⁷ Statistics New Zealand, above n 4, at 7.

²⁸ Ministry for Women, above n 4.

²⁹ Statistics New Zealand, above n 4, at 5.

³⁰ Goldman Sachs "*Closing the Gender Gap: Plenty of Potential Economic Upside*" (Research report, 9 August 2011) at 2.

³¹ Rochelle Hume "Paid in Full? An Analysis of Pay Equity in New Zealand" 7 *Auckland U L Rev* 471 (1992-1995) at 474.

³² Judy McGregor, Sylvia Bell and Margaret Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books Ltd, Wellington, 2016) at 82.

men and women.³³ As a consequence of occupational segregation by gender, pay inequity is a form of systemic and indirect discrimination. Labour markets that undervalue women's work are therefore seen to deny women of a basic human right to non-discriminatory work and income.³⁴

International human rights law has long recognised a specific right to pay equity.³⁵ Equal pay for work of equal value is a founding principle of the International Labour Organisation (ILO) of which New Zealand is a member state.³⁶ The ILO's Convention 100 on Equal Remuneration for Men and Women Workers of Equal Value (1951) (Convention 100) requires member states to recognise the principle by implementing measures that objectively assess the value of work performed by men and women.³⁷ The Convention on the Elimination of all Forms of Discrimination Against Women (1979) (CEDAW), which has been described as an "international bill of rights for women", also requires governments to protect the right to pay equity.³⁸ The principle is further protected in the International Covenant on Economic, Social and Cultural Rights.³⁹

Despite having obligations under these conventions, New Zealand is not currently considered to be compliant. In response to a report submitted by New Zealand in 1998, the CEDAW committee expressed serious concern at the lack of legislation and strategy to implement equal pay for work of equal value.⁴⁰ The ILO's Committee of Experts on the Application of Conventions and Recommendations has also repeatedly commented on

³³ Director-General of the International Labour Organisation *Equality at Work: tackling the challenges* Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (published 96th ILC Session, 2007) at 7.

³⁴ May Cornish and Fay Faraday, above n 18, at 2.

³⁵ Universal Declaration of Human Rights, art 23(2) states that everyone has the right to equal pay for work of equal value.

³⁶ May Cornish and Fay Faraday, above n 18, at 2.

³⁷ Equal Remuneration Convention, 1951 (ILO 100) 165 UNTS 303 (opened for signature 29 June 1951, entered into force 3 June 1984), art 3.

³⁸ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1249 UNTS 99 (signed 17 July 1980, entered into force 9 February 1985); United Nations Entity for Gender Equality and the Empowerment of Women *Introduction to Convention on the Elimination of All Forms of Discrimination Against Women* (2003) <www.un.org/womenwatch/daw/cedaw/index.html>.

³⁹ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 12 November 1968, entered into force 28 March 1979), art 7.

⁴⁰ Committee on the Elimination of Discrimination against Women *Report (18th and 19th sessions)* GA Res 53/38, A/53/38/Rev.1 (1999).

New Zealand's lack of legislation for pay equity.⁴¹ Most recently in 2012, the Committee expressed concern that New Zealand had not given full legislative effect to the principle of equal pay for work of equal value.⁴² The only sanctions for non-compliance with these conventions currently are indirect, including negative reports such as these and potential loss of reputation.⁴³

New Zealand has long been committed to the notion of equality including that of economic equality between men and women. The achievement of such equality operates within a broad framework that seeks to establish equal employment relationships. The implementation of pay equity continues to be one of the most significant issues for New Zealand in this framework.⁴⁴

D Law reform as a tool for change

Pay equity has traditionally been encompassed in a broad campaign for equal pay. Legal strategies have been central to political movements for achieving economic equality for women throughout many western democracies since the 1960s including New Zealand.⁴⁵ These campaigns for pay equity generally seek to change the way society values the economic contributions of women through establishing a particular form of legal recognition. Any success of law reform on pay equity is shaped by the socio-economic context in which it both operates and seeks to challenge.

Implicit in this discussion of pay equity is an understanding that equal pay law is socially and politically framed by seeking to serve a particular need in society. This socio-legal

⁴¹ International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2001, published 90th ILC session, 2002).

⁴² International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations *Observation: Equal Remuneration Convention, 1951 (No 100) – New Zealand* (adopted 2011, published 101st ILC session, 2012).

⁴³ Linda Hill, above n 16, at 7.

⁴⁴ Ian McPherson "Pay equity: the right to a fair wage" [2016] NZLJ 253 at 253.

⁴⁵ Dorothy E Chunn, Susan B. Boyd and Hester Lessard "Feminism, Law and Social Change: An Overview" in Dorothy E Chunn, Susan B. Boyd and Hester Lessard (eds) *Reaction and Resistance: Feminism, law and social change* (UBC Press, Toronto, 2007) 1 at 1.

approach, which posits law as a social instrument directed at a specific goal, has become an increasingly popular theoretical framework for considering law reform.⁴⁶ Law is acknowledged to be limited politically and practically in providing a solution to a social problem.⁴⁷

As a result, campaign strategies that seek pay equity in New Zealand have not been confined to seeking legislative change as a solution. The types of law reform pushed for and developed in the interests of achieving pay equity in New Zealand vary between new forms of legislation, the formulation of policy and the use of litigation to achieve certain results. Pay equity campaigners adjust their approaches according to what avenue is most likely to achieve successful reform in the prevailing context. Over time the efficacy of these calls for reform have been shaped by prevailing socio-economic concerns and these in turn dictate the attitudes of institutions responsible for the implementation of equal pay as well as the empowerment of those who seek to enforce it.

While a right to be free from gender-based discrimination may be enshrined in legislation, its success in achieving change is dependent on the extent to which those implementing the law, including both the courts and employers, are willing to uphold such a right. The various tools for reform thereby ebb and flow in efficacy and the conceptualisation of pay equity as a human right is similarly shaped by prevailing economic and human rights discourses.

III An Unfulfilled Promise: Pay Equity in the Equal Pay Act 1972

Discriminatory pay rates and conditions of employment are prohibited by a number of laws in New Zealand including the Government Service Equal Pay Act 1960, the Bill of Rights Act 1990⁴⁸ and the Human Rights Act 1993⁴⁹. The Equal Pay Act 1972 is a core

⁴⁶ Susan Armstrong “Evaluating Law Reform” (2006) 10 UWSLR 157 at 158.

⁴⁷ Susan Armstrong, above n 46, at 167.

⁴⁸ Bill of Rights Act 1990, s 19.

⁴⁹ Human Rights Act 1993, part 2.

part of this anti-discrimination and human rights legislative framework.⁵⁰ From the very beginning, the scope of the Act's application was highly contested, with the provision for equal pay for work of equal value being unclear.⁵¹ This ambiguity has markedly influenced and impacted upon the ability of law reform to achieve pay equity in New Zealand.

A Background to the Act

During the 1960s, official support for equal pay legislation started to emerge in New Zealand.⁵² The decade had seen a surge in the participation of women in the labour force which convinced the Labour Department that equal pay legislation was desirable.⁵³ The Government Service Equal Pay Act 1960 was implemented to remove separate male and female rates of pay in the public sector. Immediate implementation of the Act was highly centralised and regulated by the Government.⁵⁴ The passing of this Act was envisaged to have a trickle on effect in the private sector by encouraging employers to follow the Government's lead. Over the next decade, however, it became apparent that the Act had little impact beyond Government departments and further reform was necessary.⁵⁵

In 1967, a National Advisory Council on the Employment of Women recommended the establishment of a commission of inquiry that would consider implementing equal pay across both the public and private sectors in New Zealand.⁵⁶ The use of Commission's to investigate issues of social importance was common in the twentieth century.⁵⁷ At this

⁵⁰ Martha Coleman "The Equal Pay Act 1972: Back to the Future?" (1997) 27 VUWLR 517 at 534.

⁵¹ Martha Coleman, above n 50, at 520.

⁵² Elizabeth Orr *Equal Pay for Work of Equal Value in New Zealand: A History of the 1960 and 1972 Equal Pay Acts* (paper presented to Women's Studies Conference, Palmerston North, November 2003) at 4. Note: Elizabeth Orr was chair of the National Advisory Council for the Employment of Women (NACEW) and played an instrumental role in establishing the 1972 Equal Pay Act.

⁵³ Elizabeth Orr, above n 52, at 4.

⁵⁴ The labour market was mostly regulated by the Industrial Conciliation and Arbitration Act 1954 at this time.

⁵⁵ Report of the Commission of Inquiry into equal pay *Equal Pay in New Zealand* (Government Printer, Wellington, 1971) at [1.14].

⁵⁶ Report of the Commission of Inquiry, above n 55, at [1.14].

⁵⁷ Alan Simpson "Commissions of inquiry – Commissions over time" Te Ara – the Encyclopaedia of New Zealand (www.TeAra.govt.nz) (20 June 2012).

time there was a broad international trend of implementing equal pay in both sectors. In 1969 the Commonwealth Arbitration Commission had extended equal pay to groups of workers in the private sector in Australia which was a key influence on official action in New Zealand.⁵⁸

In 1971, a Commission of Inquiry into Equal Pay (the Commission) was tasked with recommending an appropriate formula to give effect to equal pay in the private sector. The Commission investigated the possibility of developing a universal method of job evaluation to eliminate gendered pay discrimination. Submissions were received from Government departments, women's organisations and representatives of employers and unions.⁵⁹ These were heard in public sittings that were widely reported on by national newspapers. The final recommendations of the Commission were almost entirely adopted by the Government and directly translated into the Equal Pay Act 1972.⁶⁰ Analysis of the Commission's report therefore equally applies to the Act.

After extensive consideration of evidence submitted in the hearings, the Commission considered that the most effective route forward for implementing equal pay was legislative reform that built upon the existing processes of arbitration in New Zealand.⁶¹ New legislation in the form of an Equal Pay Act was however preferable over amendments to existing legislation, as in the Commission's view a new Act would achieve progress on equal pay at a faster pace and with greater certainty.⁶² This Act was envisaged to give effect to equal pay by prohibiting discrimination in pay rates on the basis of gender, establishing the rights and obligations of employers and employees, and laying down the principles to be followed in ensuring compliance.⁶³

⁵⁸ Elizabeth Orr, above n 52, at 4.

⁵⁹ Report of the Commission of Inquiry, above n 55, at 9.

⁶⁰ Elizabeth Orr, above n 52, at 6.

⁶¹ Report of the Commission of Inquiry, above n 55, at chapter 4.

⁶² Report of the Commission of Inquiry, above n 55, at [4.7].

⁶³ Report of the Commission of Inquiry, above n 55, at [4.7].

B The Equal Pay Act 1972: was equal value included?

Equal pay was intended by the Commission to eliminate distinctions in rates of remuneration by categorising work according to objective factors for a particular category of work rather than on the basis of gender.⁶⁴ The Commission rejected proposals from the Employers' Federation and the Manufacturers' Federation that this should exclude work predominantly or exclusively performed by women.⁶⁵ A broad definition of 'equal pay' was adopted in the Act as a rate of remuneration in which there is no element of differentiation based on gender.⁶⁶ It has been observed that this is very similar to the definition of equal pay for work of equal value in Convention 100.⁶⁷ The New Zealand Employers' Federation commented at the time that the Commission's definition of equal pay was "extremely liberal and far-reaching".⁶⁸

The Commission's Order of Reference included an instruction to have regard to the provisions of the ILO Convention 100 which requires states to implement equal pay for work of equal value.⁶⁹ There are strong indications that the Commission intended to give effect to this term of reference by including equal value assessments in its recommendations.⁷⁰ A submission from the New Zealand Federated Dental Technicians' and Assistants' Industrial Association of Workers to the Commission was even concerned that the commission was focusing on equal pay for work of equal value at the expense of achieving equal pay for "similar work".⁷¹

Occupational segregation was extensively discussed by the Commission and recognised as a cause of unequal pay in New Zealand.⁷² The report focuses on the divided spheres of work between men and women that are "deeply rooted in the conventions and behaviour

⁶⁴ Report of the Commission of Inquiry, above n 55, at [1.6].

⁶⁵ Report of the Commission of Inquiry, above n 55, at [2.10].

⁶⁶ Equal Pay Act 1972, s 2.

⁶⁷ Elizabeth Orr, above n 52, at 5.

⁶⁸ *Special report of the Research and Information Services Division of the NZ Employers' Federation*, (30 November 1971) at 3 as cited in Elizabeth Orr, above n 52, at 6.

⁶⁹ Report of the Commission of Inquiry, above n 55, at 20 and 5.

⁷⁰ Martha Coleman, above n 50, at 524.

⁷¹ "Wage authority 'barrier to equal pay'" *The Christchurch Star* (New Zealand, 14 April 1971).

⁷² Martha Coleman, above n 50, at 524; Ian McPherson, above n 44, at 254.

patterns of our society”.⁷³ Work performed predominantly by women was attributed to unjustified traditional perceptions of women’s economic role in society.⁷⁴ The Commission also accepted ‘undoubted’ evidence that occupations traditionally performed by women were paid at lower rates than those performed by men.⁷⁵ Systemic and indirect discrimination against women was accounted for in the Commission’s considerations of what could be effective reform. Based on these considerations by the Commission, the 1972 Act was clearly intended to address occupational segregation and the economic valuation of women in the implementation of equal pay.⁷⁶

Two different criteria to be applied in determining equal pay are outlined in the Act on the Commission’s recommendation. Section 3(1)(a) applies to work which is either dominated by men or where neither gender predominates. By contrast, s 3(1)(b) applies to work that is exclusively or predominantly performed by women. This section requires consideration of the skill, effort and responsibility required in the respective work as well as the conditions under which it is performed; criteria which are commonly used in equal value comparisons.⁷⁷

At the time of the Commission’s inquiry the labour market was highly centralised and wages in the private sector were negotiated by unions and employer representatives, subject to approval from the Court of Arbitration.⁷⁸ Forty per cent of workers in New Zealand were covered by such awards and agreements with a further twenty-five per cent falling under the Government Service Equal Pay Act 1960.⁷⁹ These awards were found by the Commission to often be set at different rates for female employees, creating

⁷³ Report of the Commission of Inquiry, above n 55, at [1.1].

⁷⁴ Report of the Commission of Inquiry, above n 55, at [1.6].

⁷⁵ Report of the Commission of Inquiry, above n 55, at [2.4].

⁷⁶ Martha Coleman, above n 50, at 518.

⁷⁷ F Eyraud et al *Equal Pay Protection in Industrialised Market Economies: in Search of Greater Effectiveness* (International Labour Organisation, Geneva, 1993) as cited in Martha Coleman, above n 50, at 522.

⁷⁸ The Court of Arbitration was a specialist industrial relations court that dealt with industrial disputes from 1894-1973. It had the power to determine wages. The Arbitration Court and the current Employment Court are successor courts.

⁷⁹ Report of the Commission of Inquiry, above n 55, at [1.5].

unequal pay for the same work.⁸⁰ Following the passing of the Equal Pay Act 1972, gender specific awards were immediately removed.⁸¹ This significantly advanced progress for pay equality by reducing the gender pay gap from 78.8 percent to 69.9 percent by 1978.⁸² Confidence in this progress under the Act spurred the Government to ratify Convention 100, satisfied that New Zealand was becoming compliant.⁸³ Equivalent progress for equal value assessments was not however realised and concern regarding the discrimination of female dominated industries remained.⁸⁴

Despite the apparent inclusion of equal value in the Commission's suggestions for reform, one of the most significant impediments to the realisation of pay equity in New Zealand has been a long-standing lack of consensus over whether equal pay for work of equal value was in fact provided for in the Act.⁸⁵ There was widespread uncertainty when the Act came into force on how broadly or narrowly the concept of equal pay could be interpreted and implemented. The two concepts of equal pay for equal work and equal pay for work of equal value were not explicitly distinguished by the Commission. Instead the principles were conflated as two different forms of implementation of the broader concept of 'equal pay'. This left the scope of the Act ambiguous. In 1975, the Review Committee noted that out of all the sections in the Act, s 3(1)(b) was "the most difficult to interpret and implement" due to a lack of guidance in the legislation on how the principle might be implemented.⁸⁶ Treasury observed that defining the 'value' of work would be problematic.⁸⁷ The lack of clarity around the identification of hypothetical comparators has been a universal difficulty for pay equity assessments in other

⁸⁰ Report of the Commission of Inquiry, above n 55, at [1.5].

⁸¹ Ian McPherson, above n 44, at 254.

⁸² Working Group on Equal Employment Opportunities and Equal Pay *Towards Employment Equity: Report of the Working Group on Equal Employment Opportunities and Equal Pay* (Wellington, 1988) at 43.

⁸³ Elizabeth Orr, above n 52, at 7.

⁸⁴ *Progress of Equal Pay in New Zealand: Report of a Committee Appointed by the Minister of Labour* (Department of Labour, June 1979) at [8.35].

⁸⁵ Martha Coleman, above n 50, at 520.

⁸⁶ *Progress of Equal Pay in New Zealand: Report of a Committee appointed by the Minister of Labour* (Department of Labour, 1975) at 5.72.

⁸⁷ The Treasury *Commission of Inquiry on Equal Pay: Economic Implications of Equal Pay* a submission to the Commission of Inquiry 1971 (28 May 1971) at 3.

jurisdictions.⁸⁸ A report in 1979 by an Equal Pay Review Committee appointed by the Department of Labour also recommended that any future review of the Act should strengthen comparisons between female-dominated occupations and male-dominated ones.⁸⁹

C An issue of social reform

Equal pay had been consistently recognised by the Commission of Inquiry as a ‘social issue’ with any reform intended to achieve widespread social change and advance women’s economic role in society.⁹⁰ The Commissions’ final report was even described as a “document of considerable social importance” by recording the diverse viewpoints on the status of women in New Zealand at the time.⁹¹ Socio-economic changes brought about by greater numbers of women in the workforce altered the ‘factual situation’ of male and female work.⁹² This shift made the issue of inequality more visible and highlighted a need for reform.⁹³ Any changes in national policy on equal pay were part of a broader shift in societal structures and perceptions about women’s economic role in society.⁹⁴ A feminist movement, that actively sought positive legal rights for women, was emerging.⁹⁵ Alleviating discrimination in rates of pay in the private sector was one of many changes that would be required to resolve the highly complex problem of gender economic inequality.⁹⁶

The Commission had stated its clear awareness that effective social law reform required a change in the “deep-rooted attitudes of New Zealanders”.⁹⁷ Required change in attitudes, habits and procedures, which had been formed in a different societal context, was

⁸⁸ Sandra Fredman, above n 17, at 195.

⁸⁹ *Progress of Equal Pay in New Zealand: Report of a Committee Appointed by the Minister of Labour*, above n 84, at [8.35]

⁹⁰ Report of the Commission of Inquiry, above n 55, at [1.15].

⁹¹ Report of the Commission of Inquiry, above n 55, at 10.

⁹² Report of the Commission of Inquiry, above n 55, at [1.15].

⁹³ Report of the Commission of Inquiry, above n 55, at [1.15].

⁹⁴ Report of the Commission of Inquiry, above n 55, at [1.17].

⁹⁵ Margaret Wilson, above n 7, at 52.

⁹⁶ Report of the Commission of Inquiry, above n 55, at [1.20].

⁹⁷ Report of the Commission of Inquiry, above n 55, at [1.6].

underlying many of the difficulties associated with implementing equal pay.⁹⁸ The Commission cautioned that legislative reform would likely only marginally accelerate a change in public opinion and attitudes towards equal pay, but could not achieve a comprehensive transformation.⁹⁹ Any official action, including legislative change, would be limited in its impact on changing public opinion regarding equal pay. Law reform could soften the “barriers to free choice” by recommending that unjustified pay rate provisions were eliminated but, ultimately individual decisions as to the demarcation of employment relationships could not be influenced.¹⁰⁰

There are indications in the Commission’s report that it had concerns about the extent to which New Zealand society would be receptive to pushes for equal pay from the Government. It noted that employers had a tendency to be influenced by widely held, and often misconceived, societal beliefs about women in employment.¹⁰¹ The New Zealand Employer’s Federation had submitted to the Commission that the potential economic and social implications were too substantial to proceed with equal pay reform at that time.¹⁰² The Federation was particularly concerned about assessing work predominantly performed by women with a fictional male worker and stated any application of criteria to assess equal pay in these occupations must be in comparison to existing jobs.¹⁰³ This lack of conviction from employers for the need for reform would hinder future attempts to implement equal pay for work of equal value under the Equal Pay Act.

The Equal Pay Act 1972 was also heralded in Parliament as a piece of ground-breaking social legislation. Prime Minister Rt Honourable John Marshall, praised the Act as:

“one of the most important pieces of legislation the House will consider this session. It is a significant forward move in the social legislation of this country, and it will be

⁹⁸ Report of the Commission of Inquiry, above n 55, at [1.20].

⁹⁹ Report of the Commission of Inquiry, above n 55, at [1.18].

¹⁰⁰ Report of the Commission of Inquiry, above n 55, at [1.18].

¹⁰¹ Report of the Commission of Inquiry, above n 55, at [3.8].

¹⁰² Report of the Commission of Inquiry, above n 55, at [1.19].

¹⁰³ *Special report of the Research and Information Services Division of the NZ Employers’ Federation* (30 November 1971) at 3 as cited in Elizabeth Orr, above n 52, at 6.

recognised as a landmark in our social history. It is in my view a matter of social justice that it should be done”¹⁰⁴

At this time, the government would traditionally control employment relationships through legislation and policy that generally sought to strike a balance between the principles of individual freedoms and the universal well-being of society.¹⁰⁵ Legislative frameworks were created to directly dictate and manage employment relationships in ways that broadly sought to uphold the fundamental values of New Zealand society at the time, including the Equal Pay Act 1972.¹⁰⁶ As a piece of anti-discrimination legislation the Equal Pay Act 1972 was designed to serve two functions. First to provide a legal basis for complaints against discriminatory practices in setting rates of pay. Secondly to outline a process for mediating these complaints. Over time however the ability of the Act to fulfil these purposes would be compromised.

IV The Battle for Progress: obstructive judicial and political treatment

A Implementation of the Equal Pay Act 1972

The Court of Arbitration was envisaged to have a positive role in advancing equal pay under the Act by providing guidance and clarification over its scope and application.¹⁰⁷ The Commission had recommended that the Court have authority to issue guidance on implementation of equal pay in its decisions due to its expertise in wage fixing.¹⁰⁸ However, very few complaints have been received over the Act’s lifetime. This includes both complaints relating to individual discrimination and those regarding the valuation of jobs predominantly performed by women.

¹⁰⁴(29 August 1972) 380 NZPD 2180), above n 10, as cited in *Service and Food Workers Union*, above n 11, at [86].

¹⁰⁵ Margaret Wilson “The Role of the State in the Regulation of Employment Relations: The New Zealand experience” (1997-1998) 2 FJLR 131 at 136.

¹⁰⁶ Margaret Wilson, above n 105, at 136.

¹⁰⁷ Report of the Commission of Inquiry, above n 55, at [4.30].

¹⁰⁸ Report of the Commission of Inquiry, above n 55, at [4.30].

Equal pay was not a new legal concept and there was widespread public awareness of the change in national policy at the time. Yet claims under the Act appear to have been largely unsuccessful from the very beginning. The lack of utilization of the courts to achieve equal pay has been widely attributed to consistently narrow and dismissive judicial treatment of equal pay issues. The first claim regarding pay discrimination was quickly dismissed by the Court despite acknowledgement that the predominance of women in particular occupations had an impact on low pay rates.¹⁰⁹ This defeat discouraged unions from devoting resources to similar claims.¹¹⁰ Support for equal pay by the unions was already thin, with many particularly dismissive or indifferent to the issue of pay equity.¹¹¹ The Review Committee in 1978-79 expressed serious concern about the Court's attitude towards the Act and the impact this would have on its future.¹¹² In 1986, this concern would prove to be well founded.

1 The Clerical Workers case

The narrow interpretation of the Act in *New Zealand Clerical Administration etc IAOW v Farmers Trading Co Ltd & Others (Clerical Workers)* significantly impeded the potential of the Act to redress pay equity.¹¹³ A case was brought to the Arbitration Court after employers had refused to negotiate equal pay claims with the Clerical Workers Union.¹¹⁴ At the time a national awards system was still operating in New Zealand and the Clerical Workers Award covered 30,000 workers of which 90% were women.¹¹⁵ The claim was intended to test whether the Equal Pay Act included the principle of equal pay for work of equal value under s 3(1)(b). It was argued by the Union that the rates paid to clerical

¹⁰⁹ *N.Z. Retail Butchers* (1974 Book of Awards, at 153); cited in Elizabeth Orr, above n 52, at 2.

¹¹⁰ Elizabeth Orr, above n 52, at 9; Prue Hyman "The Law and Practice in New Zealand with regard to the Promotion and Application of Equal Pay" (a paper prepared for the ILO, 1990) at 6.

¹¹¹ Mai Chen *Women and Discrimination: New Zealand and the UN Convention* (Victoria University Press, Wellington, 1989) at 23.

¹¹² *Progress of Equal Pay in New Zealand: Report of a Committee Appointed by the Minister of Labour*, above n 84, at 49.

¹¹³ *New Zealand Clerical Administration etc IAOW v Farmers Trading Co Ltd & Others* [1986] ACJ 203; Mai Chen, above n 111, at 22.

¹¹⁴ Martha Coleman, above n 50, at 531.

¹¹⁵ *New Zealand Clerical Administrative etc IAOW*, above n 113, at 204.

workers were lower than awards for work of equal value because it was work largely performed by women.

Whether this argument rang true and amounted to discrimination as prohibited by the Act was never considered. The Court declined to hear the case on the grounds that equal pay had already been achieved through the abolishment of separate award systems for men and women after its enactment.¹¹⁶ The implementation period for the abolishment of the awards was further interpreted by the Court as the definitive lifetime of the Act. After the initial implementation period however, disputes regarding breaches of the principle were still able to be heard.¹¹⁷ Many pay equity activists at the time stated their belief that the Court had misinterpreted the Act and that a very different result would have been reached if the Court had adopted a more appropriate approach.¹¹⁸ The narrow interpretation was argued to be a failure on the part of the Court to perform its proper function in implementing the Act.¹¹⁹

The union appears to have anticipated this response.¹²⁰ Dismissive judicial attitudes towards equal pay were not new. Prior to the Equal Pay Act 1972 coming into force, a number of pay disputes had been brought to the Court of Arbitration by Trade Unions. These claims were largely unsuccessful as the Court considered introducing equal pay a 'progressive measure' that needed to be implemented through legislation.¹²¹ Yet even after the requested Equal Pay Act was enacted, the Court continued to adopt cautious approaches to equal pay demonstrating that a change in judicial attitudes was similarly required to advance law reform.

¹¹⁶ *New Zealand Clerical Administrative etc IAOW*, above n 113, at 207.

¹¹⁷ "Special Equal Pay Authority Urged by Council" *The Evening Post* (New Zealand, 4 May 1971).

¹¹⁸ Elizabeth Orr "The Arbitration Court's Role in Supervising the Equal Pay Act 1972" *Equal Pay for Work of Equal Value A Women's Issue* (seminar paper Centre for Continuing Education, Victoria University of Wellington, 1986) at 13 as cited in Megan Cook *Just Wages: History of the Campaign for Pay Equity 1984-1993* (Coalition for Equal Value Equal Pay, Wellington, 1994) at 6.

¹¹⁹ Elizabeth Orr, above n 52, at 10.

¹²⁰ Martha Coleman, above n 50, at 530.

¹²¹ *Evening Post*, above n 117.

The dismissal of the case was unsurprising and the Union did not appeal the decision.¹²² This dismissal and lack of an appeal fostered a widespread perception that the Equal Pay Act did not provide for pay equity claims, including among government officials.¹²³ The case was understood to be a definitive view on the scope of the Act.¹²⁴ Section 3(1)(b) remained untested and undefined. Any potential for the Act to be used to address equal pay for work of equal value was seriously impaired as a result.¹²⁵ The case reveals a disjoint in perceptions as to whether the Act included the principle of equal pay for work of equal value between the creators of the Act (i.e. the legislators) and the bodies involved in implementing it (i.e. the courts). Elizabeth Orr, a member of the 1978-1989 Review Committee of the Equal Pay Act 1972 and expert witness in the *Clerical Workers* case, observed that the decision indicated that the limited success of the Equal Pay Act was attributable as much to the perspectives and decision-making of the Courts as a willingness for reform on the part of legislators.¹²⁶

B Further legislative reform: the Employment Equity Act 1990

The lack of progress in the Courts in the 1980s diverted the focus of equal pay campaigners, most notably women's organisations, back to a longer term campaign for legislative reform as an avenue for achieving pay equity. Social activism for the issue had gained extra vigour with a national pay equity campaign launched in 1986 by the newly formed Coalition for Equal Value Equal Pay.¹²⁷ There was a growing awareness within

¹²² Megan Cook *Just Wages: History of the Campaign for Pay Equity 1984-1993* (Coalition for Equal Value Equal Pay, Wellington, 1994) at 7.

¹²³ Margaret Wilson "Old law cannot deliver pay equity today" (press release, 13 February 2004) - Minister of Labour Margaret Wilson stated the Equal Pay Act 1972 "was not designed to advance modern pay equity claims"; see Treasury *Background Information for the Pay and Employment Equity Taskforce* (22 June 2003) - the Equal Pay Act 1972 was described to eliminate different gender pay rates for the same work and did not extend to equal pay for work of equal value at 33; see also Treasury *Pay and Employment Equity - A framework for Analysis* (8 May 2003) - the Equal Pay Act was described as providing equal pay for men and women doing the same job at 3.

¹²⁴ Frances M. Wright "Equal Pay and the Employment Contracts Act 1991" (1992-1995) 7 *Auckland U L Rev* 501 at 501 - Wright argued that the scope of the Act was limited because it didn't provide for pay equity as indicated by the *Clerical Workers* case.

¹²⁵ Elizabeth Orr, above n 52, at 6.

¹²⁶ Elizabeth Orr, above n 52, at 11.

¹²⁷ Megan Cook, above n 122, at 28.

the Government that further development of social policy on pay equity was needed and the issue was included in the Labour Party's election manifesto in 1987.¹²⁸ Legislation that clearly provided for pay equity and contained more effective guidance on how it might be implemented was sought after as a secure option to achieve reform.¹²⁹

In 1987 the re-elected Labour Government commissioned an Equal Pay Study from the Department of Labour to review "the current operation of equal pay legislation in New Zealand" and identify any remaining areas where rates of pay were discriminatory based on gender.¹³⁰ The study found that a substantial pay gap still existed in New Zealand and concluded this was largely attributable to the Equal Pay Act 1972's failure to deliver equal pay for work of equal value. These findings were coupled with mounting scrutiny over New Zealand's failure to adhere to its international obligations regarding pay equity.¹³¹ A renewed effort on the part of the Government to look at new legal options for achieving pay equity became imperative.¹³²

A Working Group was appointed in 1988 to consider how pay equity might be achieved, including whether there was a need for new legislation. The group consulted women's organisations and unions that represented low paid women.¹³³ The introduction of legislation that would specifically provide for procedures for implementing pay equity was recommended.¹³⁴ The Working Group's conclusions were premised on the perception that the Equal Pay Act was unable to provide for the equal pay for equal value principle, demonstrating the impact of the court's decision in *Clerical Workers*.

¹²⁸ Margaret Wilson "The Employment Equity Act 1990" in John Deeks and Nick Perry (Eds) *Controlling Interests: Business, the state and society in New Zealand* (Auckland University Press, Auckland, 1992) at 123.

¹²⁹ Elizabeth Orr, above n 118, at 13 as cited in Megan Cook, above n 122, at 7.

¹³⁰ Equal Pay Steering Committee *Equal Pay Study Phase Two Report* (Department of Labour, Wellington 1987) at 1.

¹³¹ Mai Chen, above n 111, at 23.

¹³² Ian McPherson, above n 44, at 254.

¹³³ Linda Hill "Equal pay for equal value: the case for care workers" (2013) 27 *Women's Studies Journal* 14 at 17.

¹³⁴ Mai Chen, above n 111, at 23.

After six years of continuous lobbying from supporters of a pay equity policy, both within and outside government, the Employment Equity Act 1990 was passed.¹³⁵ The Government believed the Act was necessary to “recognise New Zealand did not have a legislative basis for pay equity claims” because the Equal Pay Act was not designed to advance pay equity claims.¹³⁶ The Act was intended to sit alongside the Equal Pay Act and rectify inequality in both opportunities of employment and rates of remuneration between occupations predominantly performed by men and women.¹³⁷ Importantly, this included redressing the “inequitable impact” of historic and current discrimination against women in the rates of remuneration paid in occupations predominantly performed by females.¹³⁸ A method for conducting gender-neutral job assessments was also importantly developed.¹³⁹ An Employment Equity Commissioner was established as a statutory body that was charged with conducting pay equity assessments.¹⁴⁰ Twelve pay equity claims were lodged as soon as the Act was passed.¹⁴¹ Before any claims could be resolved however the election of a National government would disrupt this progress.

C A step backwards: pay equity a politically charged issue

Three months after the Employment Equity Act 1990 was passed a newly elected National Government repealed the Act. Minister of Labour Hon William Birch argued that the National party and Labour party had fundamentally different beliefs in equity principles.¹⁴² While the National government was committed to equity in employment, pay equity was dismissed as an inappropriate mechanism for achieving it.¹⁴³ A political

¹³⁵ Margaret Wilson, above n 128, at 129.

¹³⁶ Margaret Wilson “Old law cannot deliver pay equity today”, above n 123 - Labour Minister Margaret Wilson stated the Equal Pay Act 1972 “was not designed to advance modern pay equity claims”.

¹³⁷ Employment Equity Act 1990, long title.

¹³⁸ Employment Equity Act 1990, long title.

¹³⁹ J Burns and M Coleman *Equity at Work: An Approach to Gender Neutral Job Evaluation* (Services Commission and Department of Labour, Wellington, 1991).

¹⁴⁰ Linda Hill, above n 16, at 8.

¹⁴¹ Linda Hill, above n 133, at 17.

¹⁴² (18 December 1990) 511 NZPD 396.

¹⁴³ (18 December 1990) 511 NZPD 396.

and ideological commitment to enterprise bargaining, meant the National party ‘fundamentally’ differed from the Labour party’s belief in centralised wage-fixing.¹⁴⁴

Pay equity did not conform to the National government’s extensive neoliberal reform of New Zealand’s labour law framework at the time. The Employment Contracts Act 1991 (ECA) was passed as part of an ideologically driven economic policy. The Act fundamentally changed New Zealand’s employment legal framework and has proven to be one of the most significant pieces of legislation in the country’s history. Employment relationships were decentralised with the abolishment of the awards system in which wages had previously been regulated and controlled by the Government.¹⁴⁵ The traditional legal framework was also predicated on a fundamental principle of collectivism.¹⁴⁶ Neoliberalism however limited the government’s role to establishing frameworks that would create an unconstrained labour market and uphold a system in which the individual was primary. Wage rates became negotiated between individual employers and employees rather than collectively between multiple employers and the Government. This deregulated and flexible labour market was believed to be a ‘fairer’ mechanism for achieving pay equity. Government involvement in employment disputes was to be kept at a minimum.¹⁴⁷

The changes had a significant impact on the ability to implement pay equity. The replacement of collective bargaining with enterprise bargaining made it more difficult to identify discrimination in a workplace as pay rates were typically shielded by confidentiality clauses.¹⁴⁸ The ability to compare wages both within and between companies became limited. Compulsory membership of unions had been a longstanding element of New Zealand’s labour framework but the ECA introduced voluntary unionism.¹⁴⁹ This had a drastic impact on union numbers and membership, and limited

¹⁴⁴ (18 December 1990) 511 NZPD 396.

¹⁴⁵ Ian McPherson, above n 44, at 255.

¹⁴⁶ Kevin Hince and Martin Vranken “A controversial reform of New Zealand labour law: The Employment Contracts Act 1991” (1991) 130 Int’l Lab Rev 475 at 477 – this principle was embodied in the Labour Relations Act 1987.

¹⁴⁷ Kevin Hince and Martin Vranken, above n 146, at 476.

¹⁴⁸ Ian McPherson, above n 44, at 255.

¹⁴⁹ Industrial Conciliation Arbitration Act 1894.

the ability of unions to provide a collective voice for women on pay equity.¹⁵⁰ Union membership is vital for low-paid workers to make court action an economic reality.¹⁵¹

Efforts on the part of the Government to achieve equality in employment did not entirely dissipate with the erasure of the employment equity legislation. Immediately after the repeal of the Act the National government's Ministers of Labour and Women's Affairs advised the Government that urgent work needed to be undertaken to implement policy that would identify and 'break down' barriers in employment for women, ethnic minorities and persons with disabilities.¹⁵² A Working Party was established in 1991 to make recommendations. Its terms of reference were however limited to achieving equity in employment opportunity and utilising resources already available in existing Government departments.¹⁵³

For the remainder of the 1990s, pay equity was excluded from the Government's policies entirely. The 1991 Working Party assured that the Equal Pay Act 1972 would continue to provide for claims of equal pay but stated that pay equity claims were artificial, arbitrary and therefore not acceptable to include in the policy.¹⁵⁴ Underlying policy suggestions was a strong belief in the ability of a decentralised free market to solve issues such as equal pay without government intervention. Former Labour Minister of the Fourth Labour Government, Margaret Wilson commented that the National government no longer saw it had a direct responsibility to provide economic and social justice for its citizens.¹⁵⁵ Research by the Ministry of Women's Affairs into the gender pay gap and the participation of women in the labour market continued, none of those projects focused on pay equity directly or systemic discrimination.¹⁵⁶

¹⁵⁰ Laila Harré "Unions and Pay Equity in New Zealand: Organisation, Negotiation, Legislation" (2007) *Labour & Industry: a journal of the social and economic relations of work* 51 at 53.

¹⁵¹ Rochelle Hume, above n 31, at 477.

¹⁵² Department of Labour *Report of the Working Party on Equity in Employment* (January, 1991) at 1.

¹⁵³ Department of Labour, above n 152, at 1.

¹⁵⁴ Department of Labour, above n 152, at 12.

¹⁵⁵ Margaret Wilson, above n 105, at 139.

¹⁵⁶ Jane Bryson and others *Performance Pay Systems and Equity: a research report commissioned by the Ministry of Women's Affairs* (March 1999), foreword at 2.

D Softer approach: 1999-2008 Labour government

Pay equity returned to the forefront of the political agenda with the election of the Labour-led coalition government in 2002.¹⁵⁷ The Labour party had promised to develop work on pay equity if elected to a second term in office.¹⁵⁸ Addressing lower levels of pay in women's occupations was officially recognised to be a core issue for lowering the gender pay gap.¹⁵⁹ In 2003, a Pay and Employment Equity Taskforce was appointed to develop an action plan on pay and employment equity in the public sector.¹⁶⁰ This plan was intended to provide a model for further voluntary implementation of pay equity in the private sector.¹⁶¹ Recommendations in the Taskforce's report, released in 2004, did not go so far as to suggest legislative amendment but rather proposed that the Government should make a clear commitment to pay equity in the public sector, develop tools to assess pay equity and establish a Pay and Employment Equity Unit to oversee implementation of the action plan. These recommendations were endorsed by the Government.¹⁶² During this period in the early 2000s, a wealth of research on pay equity was commissioned by the Taskforce and a number of studies were also conducted by the Ministry of Women's Affairs.¹⁶³

The policy work undertaken by the Labour Government importantly signalled to employers and unions that pay equity was still an issue and provided a wealth of qualitative information.¹⁶⁴ It was, however, a significantly softened stance compared to the previous work on pay equity, focused only on the public sector and implemented

¹⁵⁷ Celia Briar, "New Zealand Conference on Pay and Employment Equity for Women" (2004) 23 *Social Policy Journal of New Zealand* 215 at 215.

¹⁵⁸ Celia Briar, above n 157, at 215.

¹⁵⁹ Ministry of Women's Affairs *Next Steps Towards Employment Equity: a discussion document* (July 2002).

¹⁶⁰ Ruth Dyson "Launch Pay and Employment Equity Unit" (press release, 13 February 2004).

¹⁶¹ Pay and Employment Equity Taskforce *Pay and Employment Equity in the Public Service and the Public Service Health and Public Service Education Sectors* (1 March 2004) at 15.

¹⁶² New Zealand Government "Pay and Employment Equity in the public sector" (press release, 13 May 2004).

¹⁶³ Ministry of Women's Affairs, above n 159 - this is the most notable and prominent report.

¹⁶⁴ Prue Hyman "Pay Equity and Equal Employment Opportunity: Policy, Rhetoric and Reality in the 2004 New Zealand Labour Market" (Labour, Employment and Work in New Zealand, 2004) at 283.

through policy approaches as opposed to legislative change.¹⁶⁵ The structures that were envisaged to deliver equity with the Employment Equity Act in 1990 had been dismantled by the changes under the ECA in 1991.¹⁶⁶ This made a revival of the Act unrealistic.¹⁶⁷ With the removal of national occupational wage awards, comparing female-dominated occupations with equivalent male-dominated occupations became more challenging.¹⁶⁸ The lack of mechanisms to assess the value of work and weaknesses in collective bargaining undermined the ability of unions to tackle the issue.¹⁶⁹

Any developments on pay equity were further required to be consistent with the Government's broader programme of improving the social and economic well-being of New Zealanders and increasing economic growth. The Labour government continued to subscribe to an orthodox economic analysis of employment policies which influenced the development of policy on pay equity.¹⁷⁰ The ECA had been replaced by the Labour government's Employment Relations Act 2000 (ERA) as the principle framework for employment relationships. The ERA promoted good faith bargaining principles for the resolution of employment disputes, but many of the ECA's features were retained, including individualised contract arrangements and an emphasis on 'productive' employment relationships.¹⁷¹ An unwavering belief in the free market had taken hold for both Labour and National governments and the opportunity to implement equal value was limited as a consequence.¹⁷² Employers continued to be averse to working with unions and apathetic towards equal pay for work of equal value.¹⁷³ Libertarian lobby-group, New Zealand Business Roundtable, had stated in response to a report by the Ministry of

¹⁶⁵ Ministry of Women's Affairs, above n 159, at 3.

¹⁶⁶ Prue Hyman, above n 164, at 3.

¹⁶⁷ Martha Coleman, above n 50, at 520.

¹⁶⁸ Celia Briar, above n 157, at 215.

¹⁶⁹ Erling Rasmussen and Danae Anderson "Between unfinished business and an uncertain future" in Erling Rasmussen (Ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (Auckland University Press, Auckland, 2010) at 218.

¹⁷⁰ Prue Hyman "Low waged work and gender pay equity in New Zealand" (paper for National Advisory Council on the Employment of Women Conference on Pay and Employment Equity for Women, June 2004) at 9.

¹⁷¹ Erling Rasmussen "Introduction" in Erling Rasmussen (Ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (Auckland University Press, Auckland, 2010) at 3.

¹⁷² Prue Hyman, above n 164, at 65.

¹⁷³ Erling Rasmussen, above n 171, at 1.

Women's Affairs on pay equity that "pay equity is a policy whose time has passed".¹⁷⁴ This resistance and apathy from employers had a significant influence on the cautious approach of the incumbent Labour Government to pay equity.¹⁷⁵

Confusion about the scope of the Equal Pay Act 1972 also remained. In 2004, an Employment Relations Law Reform Bill sought to "explicitly recognise that providing equal pay is part of the duty of good faith" by repealing the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960 and bringing equal pay under the good faith employment relations framework in the ERA.¹⁷⁶ Claims for equal pay for work of equal value would however not be included.¹⁷⁷ Women's organisations and political groups that had fought for new legislation in the late 1980s found themselves advocating for the status quo by urging for preservation of the Equal Pay Act.¹⁷⁸ The Pay Equity Taskforce also encouraged the Government to review the Bill to ensure that it would provide for pay equity claims, partly to ensure it would meet New Zealand's international obligations.¹⁷⁹ The Bill was never passed. While the Equal Pay Act 1972 was not in use for equal value claims at this time, its repeal would have removed any potential for it to serve this need and would have dealt a "symbolically a severe blow" to equal value policies.¹⁸⁰

E Lack of progress: pay equity left off the political agenda

After 2004, no further policy or research was conducted by the incumbent Government around pay equity. With the election of a National Government in 2009, the policy efforts on the part of the predecessor Labour government were to a large extent dismantled. As part of reprioritisation of Government spending and broader plans to reduce the size of the public service to open up the labour market, the Pay and Employment Equity Unit

¹⁷⁴ Letter from Norman LaRocque (New Zealand Business Roundtable) to Judy Lawrence Chief Executive Ministry of Women's Affairs regarding the Ministry's discussion document *Next Steps* (29 November 2002).

¹⁷⁵ Prue Hyman, above n 170, at 2.

¹⁷⁶ Margaret Wilson "Old law cannot deliver pay equity today", above n 123.

¹⁷⁷ Prue Hyman, above n 164, at 285.

¹⁷⁸ Prue Hyman, above n 164, at 286.

¹⁷⁹ Pay and Employment Equity Taskforce, above n 161, at 69.

¹⁸⁰ Prue Hyman, above n 170, at 3.

was discontinued.¹⁸¹ Free market rationales and soft policy, including toolkits, employer education and research were seen as sufficient to close the gender pay gap.¹⁸²

In briefing papers to the 2009 National Government, the Ministry of Women's Affairs stated that government intervention on equal pay was not a solution to closing the gender pay gap stating that the issue would "not necessarily respond to further legislation or other forms of direct government action".¹⁸³ The preferred approach was to push for collaboration with businesses, NGO's and the wider government sector to influence a change in behaviour.¹⁸⁴ It was an approach that was tailored to suit the National government's broader agenda of a decentralised employment framework.¹⁸⁵ The National Government's policy on 'pay and employment equity' explicitly ruled out investigations into whether female-dominated occupations were undervalued in comparison to male-dominated work.

After the wide-sweeping economic restructuring of the 1980s, both Labour and National governments were wary of major interventions in the market which would be required to implement pay equity.¹⁸⁶ Equal pay for work of equal value was a highly controversial issue, both ideologically and practically, due to its requirements for the government to take action and responsibility if it were to be achieved.¹⁸⁷ Investment in pay equity initiatives was not economically or politically feasible in the wake of the 2008 global financial crisis.¹⁸⁸ During this time there was also a general apathy on the part of politicians and the media towards equal pay.¹⁸⁹ This was premised on an understanding that the gender pay gap had been closed due to other achievements in gender equality

¹⁸¹ Kate Wilkinson "Pay equity unit disestablished" (press release, 13 May 2009).

¹⁸² Judy McGregor "The human rights framework and equal pay for low paid female carers in New Zealand" (2014) 38 *New Zealand Journal of Employment Relations* 4 at 11 – the Ministry of Women's Affairs was given greater responsibility for this work.

¹⁸³ Ministry of Women's Affairs *Briefing to the Incoming Minister of Women's Affairs* (2008) as cited in Prue Hyman, "Pay Equity and Equal Employment Opportunity in New Zealand: Developments 2008/2010 and Evaluation" *New Zealand Journal of Employment Relations* 36(1): 65-75 at 65.

¹⁸⁴ Prue Hyman, above n 183, at 65.

¹⁸⁵ Prue Hyman, above n 183, at 65.

¹⁸⁶ Prue Hyman, above n 183, at 66.

¹⁸⁷ Prue Hyman, above n 164, at 285.

¹⁸⁸ Margaret Wilson, above n 7, at 57.

¹⁸⁹ Judy McGregor, above n 182, at 11.

such as equal pay for the same work and educational opportunities.¹⁹⁰ New Zealand also considered itself to be compliant with its international obligations, including ILO Convention 100.¹⁹¹ Although the ILO Committee repeatedly stated this was not the case.¹⁹²

The Equal Pay Act 1972 had however survived the sweeping legislative reforms to New Zealand's labour market of the 1980s and 90s.¹⁹³ For the next two decades, the issue of whether the Equal Pay Act 1972 provided for claims for equal pay for work of equal value was left unresolved.¹⁹⁴ The ability to conduct equal pay for work of equal value assessments under s 3(1)(b) of the Act remained untested due to a prevailing view that the Act was simply redundant.¹⁹⁵ The preservation of the Act would prove to provide an essential avenue for elevating the principle of equal pay for work of equal value above political wavering to an issue that requires law reform.

V Resurgence of Reform: the Terranova case

A Background: a new political climate

While judicial interpretations and the political and economic commitments of the Government had inhibited progress around law reform on pay equity during the 1980s and 90s, an emerging rights discourse in the early twenty-first century was promising to fill the gap and empower a new push for change. The prospects of bringing another test case for equal pay for work of equal value under s 3(1)(b) of the Equal Pay Act 1972 had not faded from the minds of pay equity campaigners. Martha Coleman, a former Wellington Clerical Workers' union organiser and prominent campaigner for pay equity, argued in 1997 that despite previous confusion around the scope of the Equal Pay Act

¹⁹⁰ Prue Hyman, above n 183, at 65.

¹⁹¹ Hon Jim Bolger *Memorandum for Cabinet: International Labour Organisation Convention No 100: Equal Remuneration and Convention No 111: Discrimination (Employment and Occupation)* (March 1983) at [3].

¹⁹² International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations, above n 42.

¹⁹³ Ian McPherson, above n 44, at 256.

¹⁹⁴ Martha Coleman, above n 50, at 534.

¹⁹⁵ Linda Hill, above n 133, at 22.

there was still potential for an interpretation of the Act that would give effect to the principle of equal pay for work of equal value.¹⁹⁶ This would particularly be the case with a modern court that had a stronger understanding of pay equity and anti-discrimination issues than the courts of the 1970s and 80s. Elizabeth Orr also stated in 1997 that judicial attitudes towards the Equal Pay Act were likely to change, especially with the introduction of the Bill of Rights Act 1990 which would create a stronger likelihood of winning an equal pay for work of equal value case.¹⁹⁷ These campaigners foresaw that a new generation of judges, who might hold more favourable attitudes towards equal pay, would bring greater prospects of success and it was essentially a matter of waiting for the right opportunity.

A number of successful cases in the new century that alleged discrimination in employment indicated that notions of anti-discriminatory and decent working conditions were gaining sway in the courts. One of the most prominent of these was the “sleepovers” case in which the Court of Appeal upheld an Employment Court decision in 2011 that disability support workers should be paid the minimum wage for sleepover shifts.¹⁹⁸ “Sleepovers” were found to be work for the purposes of the Minimum Wage Act 1983 because the freedoms of care workers’ were considerably constrained over this time.¹⁹⁹ The claim had been brought by the Service and Food Workers Union (SFWU) and the Public Service Association (PSA). A new culture of understanding had taken hold throughout the unions in which there was increasing support for mobilising low paid workers.²⁰⁰

Momentum on pay equity was also being garnered by other non-governmental bodies, most notably through human rights frameworks.²⁰¹ The Human Rights Commission (HRC) had assumed responsibility in the wake of the disestablishment of the Pay Equity

¹⁹⁶ Martha Coleman, above n 50, at 534 – note this paper was written by Coleman as a law student at Victoria University to fulfill the Honours Programme requirements.

¹⁹⁷ Trade Union History Project *Fifty Years of Struggle: The Story of Equal Pay* (proceedings of Trade Union History Project Annual Seminar, 25 October 1997) at 28.

¹⁹⁸ *Idea Services Ltd v Dickson* [2011] NZCA 14.

¹⁹⁹ *Idea Services Ltd*, above n 198, at [8] and [12].

²⁰⁰ E Tū “Equal Pay” Campaign page (July 2016) <http://www.etu.nz/article.php?group_id=773>

²⁰¹ Judy McGregor, above n 182, at 12.

and Employment Unit and sought to fill the gap it had left. Work by the HRC on pay equity is led by the Equal Employment Opportunities (EEO) Commissioner who has a statutory function to promote pay equity as an equal employment opportunity.²⁰² To fulfil this function, the EEO Commissioner attempts to monitor the progress of pay equity in New Zealand, leads discussions about pay equity and conducts research on women's position in New Zealand society.²⁰³

A national inquiry into the aged care sector in 2012 called *Caring Counts* had a significant impact on the understanding of pay equity in New Zealand. The inquiry's findings revealed that the low pay rates in this sector were directly caused by historic undervaluation of traditional 'women's work'.²⁰⁴ The report was widely publicised by the media.²⁰⁵ The Government accepted its findings and acknowledged that there was an issue of occupational inequality but stated that it had insufficient resources at the time to rectify it.²⁰⁶ Regardless, the report had triggered a renewed advocacy for pay equity and would provide an evidential basis for subsequent litigation.²⁰⁷

B Judicial treatment of the Equal Pay Act in Terranova

A social and political climate had emerged in which the Service and Food Workers Union felt that an equal value case, which had the potential to benefit a large number of low-paid women in New Zealand, had a strong likelihood of success.²⁰⁸ In 2012, the SFWU supported aged care worker Kristine Bartlett to bring a claim in the Employment Court against her employer Terranova Homes Ltd which operated a number of rest homes throughout New Zealand. Bartlett brought her claim on behalf of a number of other rest

²⁰² Human Rights Act 1993, section 5(1)(d).

²⁰³ Margaret Wilson, above n 7, at 56.

²⁰⁴ New Zealand Human Rights Commission *Caring Counts: Report of the Inquiry into the Aged Care Workforce* (May 2012) at 13.

²⁰⁵ Judy McGregor, above n 182, at 4; see also Television 3 News "Calls for higher pay for aged care workers" *Newshub* (online ed, 28 May 2012) <www.newshub.co.nz>; David Kemeys "Undercover boss slams workers' conditions" *The Sunday Star Times* (online ed, Auckland, 27 May 2012); and Michelle Duff "Rest home spy hails saint-like workers" *The Dominion Post* (online ed, Wellington, 28 May 2012).

²⁰⁶ Television 3 News "Government won't increase aged care pay" *Newshub* (online ed, May 28 2012) <www.newshub.co.nz>; Claire Trevett "Aged care pay inequality a costly fix" *The New Zealand Herald* (online ed, Auckland, 28 May 2012).

²⁰⁷ Judy McGregor, above n 182, at 12.

²⁰⁸ Linda Hill, above n 133, at 19.

home workers; all of whom were female, employed on individual employment agreements and members of the SFWU. Over 90% of Terranova's employees were female, with four male employees out of 110 caregivers in total. Bartlett argued that her rate of remuneration at \$14.46 an hour (less than a dollar over the minimum wage) was significantly lower than it would be if the aged care sector was not dominated by female employees.²⁰⁹ This was claimed to be discrimination under the criteria in s 3(1)(b) of the Equal Pay Act 1972 which applies to work predominantly performed by females.²¹⁰

From the outset, the Employment Court emphasised that the unprecedented nature of the litigation meant any conclusive answers would have potentially broad social, financial and political implications.²¹¹ These implications attracted a number of prominent interveners on the case including the Council of Trade Unions, the New Zealand Aged Care Association, Business New Zealand, the Coalition for Equal Value Equal Pay and the Human Rights Commission.²¹² The majority of Employment Court judges also sat on the case. As the decision touched on an issue of public policy the Attorney-General also had a right to make submissions.²¹³

1 The Employment Court's decision

The Employment Court agreed to consider and answer preliminary questions of law in the case, a number of which were novel issues.²¹⁴ The answers to these questions would then be applied in a later substantive hearing with a factual inquiry specific to implementing pay equity in the residential aged care sector. Any conclusions regarding the questions of law would determine the evidential scope of subsequent claims for pay equity in other sectors.

²⁰⁹ *Service and Food Workers Union*, above n 11, at [5].

²¹⁰ *Service and Food Workers Union*, above n 11, at [5].

²¹¹ *Service and Food Workers Union*, above n 11, at [2].

²¹² Judy McGregor, Sylvia Bell and Margaret Wilson, above n 32, at 92.

²¹³ John Burrows and Ross Carter *Statute Law in New Zealand* (5th ed, LexisNexis NZ Limited, Wellington, 2015) at 277.

²¹⁴ *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 51 [*Service and Food Workers interlocutory judgment*].

A number of the preliminary questions raised novel issues of law under the Act.²¹⁵ The key issue raised was whether the requirement for equal pay for work that is performed exclusively or predominantly by female employees in s 3(1)(b) included equal pay for work of equal value as a remedy for systemic undervaluation of such work by women.²¹⁶ A further issue was how compliance with this requirement would be assessed.²¹⁷ The parties sought a determination of whether the criteria in s 3(1)(b) could include comparisons with a hypothetical rate that would be paid if it were not for the fact that the occupation was female dominated or was limited to identifying a rate that would be paid to males performing the same work.²¹⁸ The Court was therefore required to engage in a statutory analysis of s 3(1)(b) for the first time.

The plaintiffs argued that the rates of remuneration paid by Terranova to its workers breached s 3(1)(b) of the Equal Pay Act, as the employees levels of responsibility, labour and service were undervalued on the basis that it was ‘women’s work’. The plaintiffs proposed that a statutory interpretation needed to engage with the text and purpose of the legislation to uphold the anti-discriminatory nature of the Act. This would further need to be consistent with both domestic human rights laws and international conventions. As evidence of the link between occupational segregation and historic undervaluation of sectors predominated by women, the plaintiffs relied on the HRC’s *Caring Counts* report.²¹⁹ Supported by the industry group Aged Care Association, Terranova Homes Ltd argued that a narrow interpretation of the Act, such as that in *Clerical Workers*, in which assessments of equal pay were limited to comparisons of the same work was the correct implementation of the Act.

After an extensive statutory analysis of s 3(1)(b) of the Equal Pay Act 1972, the Employment Court’s decision fell in favour of the plaintiff, concluding that the Act is intended to include the concept of equal pay for work of equal value. The evidence taken

²¹⁵ *Service and Food Workers Union*, above n 11, at [6].

²¹⁶ *Service and Food Workers Union*, above n 11, at [7].

²¹⁷ *Service and Food Workers Union*, above n 11, at [7].

²¹⁸ *Service and Food Workers interlocutory judgment*, above n 214, at [7].

²¹⁹ *Service and Food Workers Union*, above n 11, at [50].

into account for this assessment was held to include skills, responsibility, conditions and degrees of effort. In addition, cross-sector comparisons were acceptable to take into account any systemic undervaluation of the work as a result of historic or structural gender discrimination.²²⁰ The Court acknowledged that differentials in cross-sector comparisons were difficult to identify and assess, however rejected the defendant's arguments that this made a broad interpretation of s3(1)(b) unworkable. In the Employment Court's view, s 3(1)(b) required a comparison between 'apples and oranges' whereas a narrow interpretation would consider 'apples and apples'.²²¹ This decision radically departed from previous understandings of the scope of the Equal Pay Act and attracted nationwide attention from the New Zealand public as a "landmark" decision for gender equality.²²²

2 *The Court of Appeal's decision*

Terranova Homes appealed the Employment Court's decision to challenge its determinations regarding the ambit of the Act and scope of comparators that could be taken into account for assessments under s 3(1)(b).²²³ The Employment Court's conclusion that the Equal Pay Act 1972 included equal pay for work of equal value was not challenged but the appellants argued that an inquiry on this basis must always be limited to a particular employer and evidence of systemic undervaluation was unable to be taken into account.²²⁴ Only in exceptional circumstances could the rates paid by other employers in the same sector be considered. Comparisons with employers in entirely different sectors were rejected entirely. The Attorney-General also submitted that taking systemic undervaluation of an occupation into account would be a step too far as it could never be relevant to a question of law.²²⁵

²²⁰ *Service and Food Workers Union*, above n 11, at [71].

²²¹ *Service and Food Workers Union*, above n 11, at [43].

²²² "Landmark gender pay equality ruling appealed" *The New Zealand Herald* (online ed, Auckland, 18 September 2013).

²²³ *Terranova*, above n 12, at [73].

²²⁴ *Terranova*, above n 12, at [76].

²²⁵ *Terranova*, above n 12, at [79].

The Court of Appeal dismissed the appeal and found the Employment Court had not misinterpreted the Act. A statutory interpretation of the text and purpose of the Act had revealed to the Court of Appeal that evidence of rates paid by other employers was plainly contemplated by the Act. Internal comparisons were seen by the Court to defeat the inclusion of s 3(1)(b) as a distinct category of assessment of work predominantly performed by females, and pay equity was encompassed in the Act's broad definition of equal pay.²²⁶ The case was subsequently directed back to the Employment Court for resolution and an appeal by Terranova to the Supreme Court was declined in 2014.²²⁷ The New Zealand Council of Trade Unions described the case as a "historic legal victory" for advancing the rectification of unequal pay in female-dominated occupations.²²⁸

3 *A purposive approach*

Both the Employment Court and Court of Appeal were guided by the anti-discriminatory purpose of the Equal Pay Act 1972 to reach their conclusions. The purposive approach is an established principle of statutory interpretation in New Zealand whereby if the purpose of an Act is clear, the text should be interpreted to give effect to such purpose.²²⁹ The approach gained prominence with the increased protection of human rights in New Zealand and became the dominant approach for statutory interpretation at the time *Terranova* was decided.²³⁰ Social legislation such as the Equal Pay Act has frequently been interpreted in light of its purpose.²³¹

This trend is partly attributable to a broader "shift in balance between public and private interest" where individual freedoms are often overruled by the broader public interest

²²⁶ *Terranova*, above n 12, at [113].

²²⁷ *Terranova Homes and Care Limited v Service and Foodworkers Union Nga Ringa Tota Incorporated* [2014] NZSC 196.

²²⁸ Georgina McLeod "Historic victory in pay equity case for carers" *New Zealand Council of Trade Unions – Te Kauae Kaimahi* (23 August 2013) <www.union.org.nz>.

²²⁹ John Burrows and Ross Carter, above n 213, at 223 – Interpretation Act 1924, s 5(j).

²³⁰ John Burrows and Ross Carter, above n 213, at 248.

²³¹ Martha Coleman, above n 50, at 536 in reference to *Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd* [1985] 2 SCR 536, 547.

intended by legislation.²³² Under the Equal Pay Act this balance is between the interests of employers against the social good of removing discrimination against women in employment. The Aged Care Association had argued that raising wages for carers would have a drastic economic impact on aged care providers because funding was received from the Government through the Ministry of Health on a per bed basis.²³³ The Employment Court however compared the achievement of pay equity with the abolishment of slavery and stated that the short term price of implementing pay equity did not outweigh the “unquantifiable” social cost of perpetuating discrimination against a vulnerable and undervalued social group.²³⁴ Arguments made by Terranova about the unworkability of the Employment Court’s interpretation due to cost were also rejected by the Court of Appeal as it did not detract from the purpose of the Act.²³⁵

The interpretation of the Equal Pay Act in *Clerical Workers* had been criticised in the past for its failure to interpret the Act according to its purpose. At the time of the 1986 decision, literal interpretations of the text without considerations of the intention behind a statute were more common.²³⁶ Coleman strongly argued in 1997 that the purposive approach should be applied to the Equal Pay Act as it was part of New Zealand’s human rights framework as an anti-discrimination law.²³⁷ She proposed that the purposive approach should be applied to the definition of discrimination under the Act, and also to the criteria in s 3 for assessing the presence of discrimination. This interpretation would be consistent with the legislative history of the Act, the New Zealand Bill of Rights Act 1990 and New Zealand’s international obligations. She predicted that jurisprudential developments in anti-discrimination law would facilitate such an interpretation in any future claims for equal pay for work of equal value under the Equal Pay Act 1972.²³⁸

The decisions of the Employment Court and Court of Appeal were consistent with these predictions. Each of these courts concluded that cross-sector comparisons that took into

²³² John Burrows and Ross Carter, above n 213, at 237.

²³³ *Service Food Workers Union*, above n 11, at [108].

²³⁴ *Service Food Workers Union*, above n 11, at [109]-[110].

²³⁵ *Terranova*, above n 12, at [172].

²³⁶ John Burrows and Ross Carter, above n 213, at 248.

²³⁷ Martha Coleman, above n 50, at 536.

²³⁸ Martha Coleman, above n 50, at 554.

account systemic undervaluation, as proven by historic, current or structural gender discrimination, would be consistent with the Act's purpose and definition of equal pay. The Employment Court had observed that the lack of guidelines or express restrictions for the implementation of s 3(1)(b) made a purposive approach particularly salient.²³⁹ The purpose of the Equal Pay Act, to remove and prevent gender discrimination in rates of remuneration, was identifiable in the long title and intentions behind its enactment.²⁴⁰ The Employment Court noted that, because s 3 provided the mechanism by which the purposes of the Act would be achieved, the Act must be interpreted consistently with this purpose.²⁴¹ The Court looked to the legislative history of the Act including the 1971 Commission's report and parliamentary debates that introduced the Equal Pay Bill. It also sought to interpret the Act consistently with New Zealand's human rights framework and international obligations under ILO Convention 100.

The Court of Appeal placed weight on different considerations in order to justify its conclusions and extrapolate the purpose of the Act. It gave less importance to New Zealand's international obligations, although observed that the ratification of a convention could indicate a Government's intention to be compliant.²⁴² The Court found there was sufficient ambiguity in the Commission's report around equal pay for work of equal value that it had little value in ascertaining whether the Act was intended to include cross-sector comparisons.²⁴³ Rather than relying on background evidence of the intention of the law-makers behind the Act, the Court of Appeal centred its interpretation on the anti-discrimination focus of the Equal Pay Act 1972. This was found to be evident in the definition of equal pay whereby the phrase "no element" of sex-based differentiation in rates of remuneration made it incontestable that the Act was intended by Parliament to be used to the "fullest possible extent".²⁴⁴ For the Court of Appeal, the express reference to work predominantly performed by women in s 3(1)(b) also indicated that the Act was intended to operate more broadly than abolishing separate award rates for the same

²³⁹ *Service and Food Workers Union*, above n 11, at [106].

²⁴⁰ *Service and Food Workers Union*, above n 11, at [31].

²⁴¹ *Service and Food Workers Union*, above n 11, at [40].

²⁴² *Terranova*, above n 12, [228].

²⁴³ *Terranova*, above n 12, at [90].

²⁴⁴ *Terranova*, above n 12, at [107].

work.²⁴⁵ The Court of Appeal concluded that there was nothing in the Act that justified the exclusion of systemic undervaluation in assessments under s3(1)(b) and the inclusion of this evidence in such assessments would uphold the anti-discriminatory purpose of the Act.²⁴⁶

4 *The guidance responsibility of the Court: section 9 of the Equal Pay Act*

A separate claim had been brought by the SFWU in these proceedings that sought a statement of principles under s 9 of the Equal Pay Act.²⁴⁷ The section states:²⁴⁸

The court shall have power from time to time, of its own motion or on the application of any organisation of employers or employees, to state, for the guidance of parties in negotiations, the general principles to be observed for the implementation of equal pay in accordance with the provisions of sections 3 to 8.

This section empowers the Court to issue guidance on how equal pay can be implemented. No court had exercised these powers previously.²⁴⁹ After making determinations on the points of law raised by the parties, the Court of Appeal directed that the Employment Court issue principles under s 9 of the Act before hearing Bartlett's substantive claim.²⁵⁰ These principles were envisaged to provide a 'workable framework' for the resolution of pay equity claims. They would include identification of appropriate comparators, guidance on how evidence could be gathered on these comparator groups, and to prove the existence of systemic undervaluation.²⁵¹ Aged care workers would be the first sector to use these principles. This direction promised to finally fulfil the role intended by the Commission in 1971 to provide guidance and clarity over the implementation of the Act.

²⁴⁵ *Terranova*, above n 12, at [35].

²⁴⁶ *Terranova*, above n 12, at [110].

²⁴⁷ Note that a claim under this section is unable to be brought by individual employees.

²⁴⁸ Equal Pay Act 1972, s 9.

²⁴⁹ *Terranova*, above n 12, at [160].

²⁵⁰ *Terranova*, above n 12, at [168] and [239].

²⁵¹ *Terranova*, above n 12, at [239].

Section 9 has an important function for the implementation of the Act through empowering the Employment Court to issue guidance to employers on the implementation of pay equity.²⁵² The Employment Court saw the exercise of the jurisdictional powers conferred under this section as an opportunity to facilitate the broader objective of the Act in making progression towards equal pay.²⁵³ This section was similarly interpreted by the Court of Appeal to serve an important ‘legislative function’ by offering an opportunity to issue guidance on how to implement pay equity and ensure claims are efficiently managed.²⁵⁴ The Court could be seen as assuming responsibility for progressing pay equity as a social justice issue.

A precise definition of the scope of this jurisdiction was not able to be determined. However, the Employment Court argued that it “would not be confined to simply restating or summarising the existing law”.²⁵⁵ The Court of Appeal stated that the purpose behind the section was difficult to identify, with very little discussion of the section identifiable in the Commission’s 1971 report and in Hansard.²⁵⁶ The Commission’s report in 1971 however clearly conveyed an intention for the Court to have a positive role in the implementation of equal pay, including the issuing of guidelines as an annex to its decisions.²⁵⁷

C Government commitment to pay equity

While the *Terranova* case progressed through the courts the Government maintained a distance from both the litigation and surrounding debates on pay equity.²⁵⁸ Although the Ministry of Health had been invited by the Employment Court to intervene in the case

²⁵² *Terranova*, above n 12, at [168].

²⁵³ *Service and Food Workers Union*, above n 11, at [117].

²⁵⁴ *Terranova*, above n 12, at [168].

²⁵⁵ *Service and Food Workers Union*, above n 11, at [116].

²⁵⁶ *Terranova*, above n 12, at [158].

²⁵⁷ Report of the Commission of Inquiry, above n 55, at [4.30].

²⁵⁸ Ian McPherson, above n 44, at 256.

because of the Government's interest in the issue, it had declined to do so.²⁵⁹ The Court of Appeal's decision however forced the Government to take an active stance on the issue. Kristine Bartlett's success had triggered a wave of claims from workers in other low paid sectors, including teachers,²⁶⁰ midwives²⁶¹ and social workers.²⁶² Faced with these mounting court cases, the government was no longer able to take a passive stance.²⁶³

The Government responded to the Court of Appeal's decision by establishing a Joint Working Group on pay equity in October 2015. This was a tripartite group of representatives from the government, unions and businesses, intended to provide "practical guidance" to the Government on how to implement pay equity.²⁶⁴ While the Working Group's discussions were taking place, pay equity claims under the Equal Pay Act were placed on hold.²⁶⁵ Another working group was set up specifically to facilitate negotiations between the parties in *Terranova* in the aged care sector. Health Minister Jonathan Coleman also confirmed a Government commitment to negotiating pay rates for nearly 50,000 care and support workers.²⁶⁶ Recommendations of the Working Group were required to be consistent with the Court of Appeal decision in *Terranova* and acknowledge that equal pay for work of equal value is provided for in the Equal Pay Act 1972.²⁶⁷

The Working Group reported back to the State Services Minister, Hon Paula Bennett, and Workplace Relations and Safety Minister, Hon Michael Woodhouse, in June 2016. The

²⁵⁹ *Service and Food Workers Union*, above n 11, at [108].

²⁶⁰ The New Zealand Education Institute backed a claim from female support workers (teacher aids) who are seeking equal pay for their profession.

²⁶¹ The country's biggest equal pay challenge to date was filed at the High Court in Wellington against the Ministry of Health – note that this argues that there is discrimination under the Bill of Rights Act 1990 rather than the Equal Pay Act.

²⁶² Public Services Association (PSA) has filed a case alleging a breach of the Equal Pay Act 1972.

²⁶³ Max Towle "Caregivers back equal pay campaign" *Radio New Zealand* (online ed, Wellington, 21 October 2015) - citing Alistair Duncan, spokesperson for the union E tū.

²⁶⁴ State Services Commission *Terms of Reference – Joint Working Group on Pay Equity Principles* (17 November 2015) at [1].

²⁶⁵ State Services Commission, above n 264, at [11].

²⁶⁶ Paula Bennett, Michael Woodhouse "Working group to pursue pay equity principles for workplaces" (press release, 20 October 2015).

²⁶⁷ State Services Commission, above n 264, at 3.

core recommendation of the Working Group was that issues of pay equity should be resolved at the earliest time possible using the good faith bargaining arrangements already present in the Employment Relations Act 2000.²⁶⁸ The principles first outlined considerations to be taken into account when assessing the merit of a pay equity claim. These included whether the work was predominantly performed by women, whether the occupation had been historically undervalued and whether this amounted to systemic undervaluation. Once a claim was accepted, then parties would be required to negotiate resolution. Guidance for this negotiation process is included in the principles whereby an occupational assessment must objectively assess the skills, responsibilities, conditions and degrees of effort involved in the work.²⁶⁹

Dr Jackie Blue, the Equal Employment Opportunities Commissioner, commented that the Working Group was a “historic first step to achieving a zero gender pay gap.”²⁷⁰ The Working Group’s principles were welcomed by unions and E Tū, formerly the SFWU²⁷¹, stated that the principles would open up a pathway for hundreds of thousands of women in low-paid sectors to achieve equity by facilitating direct negotiation with employers.²⁷² The New Zealand Council of Trade Unions pushed for the principles and recommendations developed by the Joint Working Group to be adopted in full by the Government.²⁷³

Throughout the lifetime of the Equal Pay Act in New Zealand there have been repeated calls for stronger and explicit dedication to pay equity from the Government. In 2004 for example the Pay and Employment Equity Taskforce called for a “clear and explicit public

²⁶⁸ Letter from Dame Patsy Reddy (Crown Facilitator), Richard Wagstaff (New Zealand Council of Trade Unions), Phil O’Reilly (Business New Zealand), Paul Stocks (Ministry of Business, Innovation and Employment) and Lewis Holden (State Services Commission) to Paula Bennett (Minister of State Services) and Michael Woodhouse (Minister for Workplace Relations and Safety) regarding *Recommendations of the Joint Working Group on Pay Equity Principles* (24 May 2016) at [1].

²⁶⁹ *Recommendations of the Joint Working Group*, above n 268, Appendix 2 at 4.

²⁷⁰ Human Rights Commission “Human Rights Commission welcomes pay equity milestone” (21 October 2015) <www.hrc.co.nz>.

²⁷¹ On the 7th of October 2015, the Service and Food Workers Union had merged with the Engineers Printers and Manufacturers Union to form E tū, the largest private sector union in New Zealand.

²⁷² John Ryall E tū Assistant National Secretary “E tū welcomes Joint Working Group principles on pay equity” (2015) (accessed 5 October 2016) <http://www.etu.nz/article.php?group_id=1036>

²⁷³ New Zealand Council of Trade Unions: Te Kauae Kaimahi “What’s the Deal with Equal Pay?” (June 2016).

commitment” by the Government to the achievement of pay equity.²⁷⁴ An assumption of responsibility on the part of the Government to work towards the implementation of pay equity, rather than relying on free market principles to correct structural inequalities, is also internationally demonstrated to further progress on pay equity.²⁷⁵ In the past the absence of an explicit commitment to pay equity had been largely justified by National governments on the basis of incompatibility with economic policy. There has also been a tendency to point to alternative achievements in tackling the gender pay gap including increased equal employment opportunities, stronger human rights legislation and greater access to higher paid positions for women.²⁷⁶ Previous work on pay equity would further focus primarily on reforming the public sector, on the assumption that any improvements would trickle on to the private sector.²⁷⁷ The Government’s commitment to addressing the issue of pay equity, embodied in the Working Group, is therefore a highly significant and historic step.

VI The Ongoing Issues for Pay Equity and Lessons for Social Law Reform

The unprecedented interpretation of the Equal Pay Act 1972 in *Terranova* had forced the Government to rapidly change its position on pay equity and it was now compelled to concede that the issue was no longer a political point of contention able to be deflected but a very real legal problem. Both the courts and the government therefore have a core function in advancing progress on pay equity in New Zealand. Despite the importance of this judicial transformation, any future methods of reform will however continue to be shaped by broader socio-economic and political constraints.

²⁷⁴ Pay and Employment Equity Taskforce, above n 161, at 55.

²⁷⁵ Pay and Employment Equity Taskforce, above n 161, at 56 reference to Susan Iversen *Analysis of Pay Equity Initiatives in the Health Sector in the UK, Ontario and New Zealand* report 12 commissioned for the Taskforce on Pay and Employment Equity in the Public Service and Public Health and Education Sectors (January 2004).

²⁷⁶ *Terranova*, above n 12, at [189].

²⁷⁷ Report of the Commission of Inquiry, above n 55, at [1.12] and [1.14].

A Litigation versus legislative reform

The Joint Working Group was established because the Government considered reliance on the courts for the resolution of pay equity issues to be undesirable.²⁷⁸ Principles issued by the Employment Court under s 9 were understood by the Government to be limited to the specific industry sector that had brought a claim.²⁷⁹ This sentiment was shared by employers.²⁸⁰ As a result, a Working Group was created that involved the primary stakeholders in pay equity disputes, to propose pay equity principles that could be applied across both public and private sectors as the preferred first step.²⁸¹ The facilitation of direct negotiations between employers and employees on pay equity claims meant that litigation would be a last resort.²⁸²

If the principles proposed by the Working Group were accepted by the Government, legislative measures would be required to bring them into force.²⁸³ Former New Zealand Court of Appeal judge, Sir Kenneth Keith stated in 1991 that law reform is a choice between legislative and judicial reform.²⁸⁴ Legislative action is typically proposed when there is a need to shift resolution of issues away from litigation towards greater certainty around legal rights and obligations.²⁸⁵ However, as the history of pay equity has demonstrated the choice between mechanisms of reform is not always so clear cut. In order to advance progress on achieving pay equity, both strong legislation and a responsive judiciary which upholds and advances any legislative goals are required.

²⁷⁸ State Services Commission, above n 264, at 3.

²⁷⁹ Paula Bennett and Michael Woodhouse “Working group to pursue pay equity principles for workplaces”, above n 266.

²⁸⁰ Sharon Brett Kelly “Pay equity ‘could cost hundreds of millions’” *Radio New Zealand* (online ed, Wellington, 8 June 2016).

²⁸¹ Note that no representatives from women’s organisations were involved. The government was represented by the Ministry of Business, Innovation and Employment and State Services Commission, the unions by the New Zealand Council of Trade Unions and employers by Business New Zealand.

²⁸² Paula Bennett and Michael Woodhouse “Working group to pursue pay equity principles for workplaces”, above n 266.

²⁸³ State Services Commission, above n 264, at 5.

²⁸⁴ Sir Kenneth Keith “The Philosophies of Law Reform” (1991) 7 *Otago L Rev* 363 at 372.

²⁸⁵ Sir Kenneth Keith, above n 284, at 372.

1 Role of litigation

Litigation does not provide a sustainable solution to the issue of pay equity.²⁸⁶ Claims are expensive and time consuming. In addition, the heaviest financial and evidential burden is likely placed on the unions and low-paid women.²⁸⁷ Rather than pay equity being pursued by employers and employees as a common goal, it instead becomes a point of conflict.²⁸⁸ The success of a case is further limited to compensating an individual or particular group of complainants and may not change the systemic causes of the discrimination.²⁸⁹ Unlike equal pay claims which allege discrimination against an individual employer, occupational segregation is a structural feature of the labour market.²⁹⁰ Individual claims brought in response to discrimination may risk masking the occupational root of the problem. The focus of the Joint Working Group on direct negotiation between employers and employees appears to seek to circumvent address these features of litigation by targeting any pay equity disputes at an earlier stage.

Despite these shortcomings, the courts serve an important function in law reform on pay equity. At its essence, litigation is an attempt to give meaning to the provisions of an Act.²⁹¹ The different ramifications of judicial interpretations in *Clerical Workers* and *Terranova* demonstrate that the courts can either facilitate or constrain social law reform in providing clarification on the meaning of an Act. By relying on the purpose of the Equal Pay Act in their interpretations, the courts in *Terranova* have recognised the Act as a piece of social legislation that was intended to achieve reform. The Employment Court in the *Terranova* litigation stated that “statutes are always speaking” and therefore a strict focus on the intention of the original lawmakers of an Act would be blind to the function that an Act ought to be performing in a contemporary context.²⁹² This was argued to be

²⁸⁶ Sandra Fredman, above n 17, at 206.

²⁸⁷ Sandra Fredman, above n 17, at 195.

²⁸⁸ Pay Equity Taskforce and Departments of Justice and Human Resources Development Canada *Pay Equity: A New Approach to a Fundamental Right* (Department of Justice Canada, Ontario, 2004) at 98.

²⁸⁹ Sandra Fredman, above n 17, at 207.

²⁹⁰ Statistics New Zealand, above n 4, at 8.

²⁹¹ Margaret Wilson, “Policy, Law and the Courts: An Analysis of Recent Employment Law Cases in New Zealand” (1995) 8 AJLL 203 at 203.

²⁹² *Service and Food Workers Union*, above n 11, at [93] and [95].

particularly the case in employment relations that are “dynamic, the subject of changing social attitudes and values, and ongoing development over time.”²⁹³ Continuous progression towards eliminating discrimination in rates of pay is identified as a key objective of the Act.²⁹⁴

The Attorney-General, in their submission to the Court of Appeal in *Terranova*, stated that the judiciary should be cautious about updating legislation in a way that “would have extensive social, cultural and economic impacts not contemplated by Parliament”.²⁹⁵ While the Court of Appeal acknowledged that this was not its role, it stated that the undervaluation of entire industries predominated by women was “undoubtedly something of concern to the 1972 Parliament”.²⁹⁶ While the Equal Pay Act had never been utilised to its full extent, the problem of unequal pay that was intended to be addressed by the Act remained at the time of *Terranova*.²⁹⁷ The values in the Act had not fallen out of date but rather had become emboldened by a broader shift in attitudes towards discrimination and human rights, including those held by the institutions that implement law reform. The core objectives of the Equal Pay Act 1972, to remove gendered discrimination in employment, therefore had sustained pertinence for a contemporary interpretation.

Terranova exposed the need for further reform, in that the weaknesses of a complaints-based framework that has been neglected by effective legislation were revealed.²⁹⁸ This is indicated by the triggering of a flood of other claims from female workers in other low paid sectors.²⁹⁹ The case not only revealed the need for reform but forced the Government’s hand in acknowledging pay equity as an issue requiring a proactive response. While litigation has not provided a solution to a systemic problem such as pay equity, it does play a fundamental role in framing the issue. By soliciting a commitment to pay equity from the Government, the *Terranova* case highlighted the capacity of the

²⁹³ *Service and Food Workers Union*, above n 11, at [93].

²⁹⁴ *Service and Food Workers Union*, above n 11, at [117].

²⁹⁵ *Terranova*, above n 12, at [115].

²⁹⁶ *Terranova*, above n 12, at [115].

²⁹⁷ John Burrows and Carter, above n 236, at 406.

²⁹⁸ Sanda Fredman, above n 17, at 210.

²⁹⁹ Dita De Boni “Will new pay parity guidelines really help women?” *Radio New Zealand* (online ed, Wellington, 9 June 2016).

courts to indirectly encourage action on an issue of reform, while undertaking a purposive approach to the interpretation of legislation such as the Equal Pay Act 1972. Even if the Government subsequently failed to take meaningful steps to implement pay equity, the *Terranova* case created an avenue for ongoing claims to be brought.

2 *Governmental responsibility over law reform*

Responsibility for what happens next rests with the Government. By regulating and controlling the employment framework in which wages are negotiated, the Government arguably has an extended responsibility to intervene in the labour market a way that ensures the adequate economic and social well-being of its citizens is upheld.³⁰⁰ Former EEO Commissioner, Judy McGregor has argued that the state's extensive funding of the employment model in New Zealand presents a strong case for extending this responsibility to any resulting "structural and systemic pay inequalities".³⁰¹ For example, Terranova Home's income was to a large extent fixed by central government, with additional funding provided by relevant District Health Boards.³⁰² When considering the role of the government in the future direction of reform, it is therefore also important to appreciate possible constraints on the ability to prioritise pay equity law reform. Despite recent progress on pay equity, and a governmental responsibility to take action, practical and political challenges that require the balancing of different considerations and commitments remain. Unlike the judiciary, it is not possible for the Government to take a neutral stance on the issue due to its inherent involvement.

The Government bears the greatest responsibility for the implementation of equal pay for work of equal value in being not only a law maker but also the country's largest employer of low paid female workers.³⁰³ The Joint Working Group on pay equity strongly emphasised the need for the Government to be proactive concerning the issue of pay

³⁰⁰ Margaret Wilson, above n 105, at 134; Ministry of Women's Affairs, above n 159, at 26.

³⁰¹ Judy McGregor, above n 182, at 12.

³⁰² *Terranova*, above n 12, at [48].

³⁰³ *Recommendations of the Joint Working Group*, above n 268, at 5.

equity for the benefit of the wider community and the government itself.³⁰⁴ The Working Group suggested that, as an employer, this proactivity could be realised through reaching equal pay settlements in sectors dominated by female employees for which the government is the primary funder.³⁰⁵ As a major employer and purchaser of contracts in low paid sectors, the Government had the power to lead by example.³⁰⁶ It also bears the greatest burden for implementing pay equity. The establishment of pay equity will require a significant reallocation of financial resources. The New Zealand Aged Care Association estimated that it would cost the aged-care sector \$500 million per annum to raise the wages of caregivers to the rate proposed by the E tū Union.³⁰⁷ There are many counter-arguments regarding the longer term benefits of pay equity and the Government has now recognised that it has long-term economic benefits which is reflected in its employment policies.³⁰⁸ A wealth of research has revealed that government action on the issue of occupational segregation has significant potential to positively contribute to New Zealand's economy in the long term, even boosting GDP by 10%.³⁰⁹ Nevertheless, the extent of the Government's financial contribution to pay equity if the principles of the Working Group are adopted, and what policy trade-offs may be involved, remains unclear.³¹⁰ While there are convincing counter-arguments regarding the long term benefits of achieving pay equity, a balancing exercise between the costs and benefits of implementing pay equity will continue to be inevitable.³¹¹

The implementation of pay equity is not only a practical issue, but a political one. The creation of new legislation is a political process, and as a result ideology unavoidably influences the allocation of rights, duties and power.³¹² The achievement of equal pay for work of equal value requires intervention from the government to an even greater degree

³⁰⁴ *Recommendations of the Joint Working Group*, above n 268, at 4.

³⁰⁵ *Recommendations of the Joint Working Group*, above n 268, at 4.

³⁰⁶ ILO Recommendation, above n 42, at [1] and [2].

³⁰⁷ Sharon BrettKelly, above n 280.

³⁰⁸ Employment New Zealand "Gender Pay Gap" *Ministry of Business, Innovation and Employment* (accessed 5 September 2016) < <https://www.employment.govt.nz/hours-and-wages/pay/pay-equity/gender-pay-gap/>>.

³⁰⁹ Goldman Sachs, above n 30, at 2.

³¹⁰ Sharon BrettKelly, above n 280.

³¹¹ Goldman Sachs report, above n 30, at 2.

³¹² Sir Kenneth Keith, above n 284, at 377.

than that required by the Equal Pay Act 1972.³¹³ As demonstrated by New Zealand's history on pay equity, the extent to which either a Labour or National government will be proactive in pushing for law reform on pay equity is dependent on a number of political considerations. The recent judicial decision and principles created by the Joint Working Group present significant questions to the Government as to how it should position itself.

Women's organisations and pay equity campaigners have expressed concern that the current National government's continuing ideological and financial commitment to a decentralised free market would result in a watering down of the principles proposed by the Joint Working Group and inhibit the progress of law reform.³¹⁴ This concern is largely centred on the historical tendency of National governments to undermine progress on pay equity. Throughout the history of pay equity in New Zealand however, National governments have not taken an entirely consistent approach. For example, it was a National government that passed the Equal Pay Act in 1972. In the 1990s, reform was also sought at a time of major economic upheaval, which differs from the current climate around questions of pay equity reform. The election of a National government in 2008 saw a shift away from major and radical reforms of employment relations in New Zealand.³¹⁵ The Government's policy on the gender pay gap in 2016 emphasises principles of good faith and natural justice, human rights and meeting legal requirements in workplace relations.³¹⁶ There is currently a greater balance between the prioritisation of social justice issues and fiscal obligations than has occurred in previous decades.³¹⁷ There has also been a shift in the approaches taken by employers in undertaking pay equity negotiations, which are now regarded with greater acceptance as a business reality.³¹⁸

³¹³ Elizabeth Orr, above n 52, at 11.

³¹⁴ Prue Hyman "Equal Pay – the case for action now" *The New Zealand Herald* (online ed, Auckland, 9 February 2016).

³¹⁵ Erling Rasmussen, above n 171, at 7.

³¹⁶ Employment New Zealand, above n 308.

³¹⁷ Judy McGregor, above n 182, at 14.

³¹⁸ Business New Zealand *Bargaining for pay equity* (policy paper, 1 July 2016) <www.businessnz.org.nz>.

B Where to from here: a new opportunity for reform?

While it is important to recognise that any law reform on pay equity is contextualised by broader socio-economic and political concerns and cannot provide an all-encompassing solution to a social problem such as pay inequity, legislation continues to play an essential role.³¹⁹ The attribution of rights and responsibilities and the recognition of collective or individual identities in legislation frames the balance of power between employers and employees.³²⁰ In addition, legislative reform has both a symbolic and substantive importance for marginalised groups that seek equality; it continues to be sought as a mechanism for achieving change.³²¹ Constitutional law expert Mai Chen has argued that “New Zealand’s history shows that true equality in employment cannot be achieved without government intervention” and reliance should not be placed on the market or the courts to rectify issues of discrimination and equality.³²² This is particularly necessary for providing pay equity to women in the private sector and in small and medium-sized businesses where union membership is low.³²³ The Joint Working Group on pay equity emphasised the importance of government investment in regulatory and support agencies with the skills, training, knowledge and resources to assist the private sector in addressing pay equity issues.³²⁴ It cautioned that these efforts should not be relied upon to effectively achieve pay equity and that legislative amendments are crucial for progress.³²⁵

Strong, effective and clear legislation that provides for collective and centralised wage bargaining was identified by the Taskforce on Pay and Employment Equity in 2004 as the most effective mechanism for reducing unequal pay attributable to occupational segregation and therefore the gender wage gap in New Zealand.³²⁶ This observation can be extended to both the public and private sector. Experience in New Zealand and

³¹⁹ Margaret Davies, above n 13, at 170.

³²⁰ Sandra Fredman, above n 17, at 215.

³²¹ Margaret Davies, above n 13, at 170.

³²² Mai Chen, above n 111, at 23.

³²³ Celia Briar, above n 157, at 215.

³²⁴ *Recommendations of the Joint Working Group*, above n 268, at 4.

³²⁵ *Recommendations of the Joint Working Group*, above n 268, at 4.

³²⁶ Report of the Taskforce on Pay and Employment Equity, above n 161, at 69.

overseas has demonstrated that establishing legal requirements for stakeholders to take action on pay equity is the most effective approach, rather than relying on policy.³²⁷ For example, the Canadian Pay Equity Taskforce recommended in 2004 that Parliament should enact proactive and explicit pay equity legislation to move away from a complaint's based model and into a structured, rights based framework.³²⁸ The power disparity between employers and employees in a deregulated labour market means voluntary implementation of pay equity for employers is no longer appropriate.³²⁹

Legislation that adopts the principles and guidelines of the Joint Working Group appears to be highly likely given the current socio-economic and political environment.³³⁰ While a revival of the Employment Equity Act 1990 is not a feasible option, due to the radically different contemporary structure of New Zealand's labour market framework, an alternative, and possibly more effective approach, may be to update and adjust the existing legal framework to suit New Zealand's contemporary economic environment. The Joint Working Group recommended that amendments be made both to the ERA and to the Equal Pay Act 1972 in order to accommodate the principles the Working Group had proposed and "recognise the special characteristics of pay equity claims".³³¹ If undertaken, the shape of these amendments will be crucial to the preservation of pay equity as a contestable legal issue in New Zealand. An area of ongoing uncertainty, is that the Working Group had controversially left unresolved the question of what comparators would be used to make pay equity assessments.³³² In its report, the Working Group commented that any comparators used must not be distorted by systemic undervaluation by being "women's work" which indicates that cross-sector comparisons are envisaged.³³³ The Working Group however remained silent on the 'sectoral proximity' of the comparator to the employees concerned in a pay equity claim. While the Court's

³²⁷ Ministry of Women's Affairs, above n 159, at 26.

³²⁸ Pay Equity Taskforce and Departments of Justice and Human Resources Development Canada, above n 328, at 7.

³²⁹ Rochelle Hume, above n 31, at 478.

³³⁰ Interview with Mai Chen, lawyer (Susie Ferguson, Morning Report, National Radio, 8 June 2016).

³³¹ *Recommendations of the Joint Working Group*, above n 268, at 3.

³³² *Recommendations of the Joint Working Group*, above n 268, at 3.

³³³ *Recommendations of the Joint Working Group*, above n 268, at 2.

analysis in *Terranova* that the Equal Pay Act included pay equity has become incontestable, the mechanisms by which it would be assessed remain open to reform.

The under-utilisation and treatment of the Equal Pay Act 1972 demonstrates that the efficacy of social law reform is not formalistic or determined by simply making a choice between different mechanisms of reform. The attribution of successes and failures of pay equity law reform to either law-makers or implementers is complex and not easily identifiable in a clear-cut way.³³⁴ The ability of both litigation and legislative change to advance pay equity is dependent on favourable yet evolving socio-economic and political conditions for the reforms that are proposed. Progress on pay equity is also hindered or facilitated depending on the attitudes and perspectives of both law makers and those responsible for its implementation. The use of the law as an instrument for change is ineffective if the underlying goals fail to align with prevailing social attitudes and economic structures. Rather than a top-down relationship, reform is influenced by a dynamic and broad set of relationships and structures.

The operation of social law reform is affected by fundamental transitions in contextual social discourses.³³⁵ Institutions that control reform are receptive to certain discourses at different times which dictates the progression of reform.³³⁶ Broader developments in judicial treatment of anti-discrimination laws made a the crucial difference between achieving meaningful reform at the time of the enactment of the Equal Pay Act 1972 and the environment in which the *Terranova* case was brought. Whereas the widespread labour market restructuring of the 1990s stalled the advancement of pay equity reform in favour of a neoliberal ideology, in recent decades a renewed civil society interest in anti-discrimination issues has provided a boost to the issue. A broad shift in attitudes towards discrimination in workplaces has called into question the value society accords to vulnerable groups in employment; low-paid women in predominantly female occupations are one such group. Ongoing efforts for reform around pay equity in the wake of *Terranova* may have more chance of success than was possible when the Equal Pay Act

³³⁴ Margaret Davies, above n 13, at 170.

³³⁵ Margaret Davies, above n 13, at 168.

³³⁶ Dorothy E Chunn, Susan B Boyd and Hester Lessard, above n 45, at 19.

was passed, as aspects of the current political and social climate appear to have caught up with many of the Act's core ambitions.

The various defeats and successes in the implementation of pay equity in New Zealand, have also mobilised efforts for reform towards different mechanisms for change in response to socio-economic and political evolutions. After the decision in *Clerical Workers* new legislation was desirable for equal pay campaigners, including unions, because the Equal Pay Act appeared ineffective in dealing with pay equity claims.³³⁷ By contrast, the *Terranova* case revealed that pay equity is already provided for in the Equal Pay Act 1972 and thereby possibly removed a need for new legislation.

Examination of the history of pay equity in New Zealand reveals that the ability to challenge social values in a tangible way through law reform is dependent on empowerment of those who are needing the change the most. Not only are the attitudes held by institutions including the courts and government vital to reform, but perceptions of the players who utilise them including unions and employers (the potential litigants and defendants) are also key to achieving change. Union support and commitment has been an essential precondition for the achievement of pay equity as they act as the legal representatives of low paid women in court claims, settlements with employers and negotiations with the Government.³³⁸ Through individualisation of employment contracts, the Employment Contracts Act 1991 has to a large extent denied collective identities, including by gender, from having legal recognition.³³⁹ An ongoing issue is also that many low-paid women in female-dominated occupations continue to face challenges in accessing union support. This is particularly the case in the private sector where union membership remains very low.³⁴⁰ Any further reform on pay equity must address the facilitation of the collective representation required by low-paid women to be successful.

³³⁷ Elizabeth Orr, 52, at 11.

³³⁸ Laila Harré, above n 150, at 51.

³³⁹ Margaret Wilson, above n 105, at 140.

³⁴⁰ Statistics New Zealand "Union membership and employment agreements – June 2016 quarter" (online at www.stats.govt.nz).

The Ministry of Women’s Affairs stated in 2002 that “the next step towards pay equity would involve not just deciding how to measure and reward work of equal value in women’s and men’s different jobs. It would also require an innovative new strategy to deliver pay equity to women.”³⁴¹ The socio-economic and political environment confronting the National government in 2016 is vastly different from that when the Equal Pay Act was passed in 1972. Any future steps in law reform that seek to achieve pay equity will require new strategies to account for New Zealand’s contemporary societal structures. These will be required to be adaptive and responsive to future societal changes in order to be successful. Taking into account the various challenges that continue to be presented to reform, the best step forward would be to seek options for reform that to an extent work within these existing structures while pushing for changes.³⁴² Efforts to generate law reform on pay equity need to recognise that the law co-exists and operates within broader social structures and economic constraints which similarly influence employment relationships and priorities.³⁴³ Legislative change is an important and necessary step forward, but it is important to remain conscious that it is only one part of the story.

VII Conclusion

Since the Equal Pay Act was passed in 1972, efforts to achieve pay equity through law reform in New Zealand have been embroiled in a complex narrative. The introduction of the Equal Pay Act 1972 was intended to achieve a comprehensive removal of discrimination in wages between men and women. While there was immediate success in achieving equal pay for the same work, equivalent progress for equal pay for work of equal value was not realised. From the outset, the creators of the Act had recognised that, in being a piece of social law reform, the success of the new law was contingent upon a favourable shift in social attitudes regarding equal pay.

³⁴¹ Ministry of Women’s Affairs, above n 159, at 16.

³⁴² Margaret Davies, above n 13, at 171.

³⁴³ Margaret Davies, above n 13, at 171.

The subsequent challenges to advancing pay equity in New Zealand reveal that achieving such an alignment in attitudes is reliant on a willingness for change on the part of lawmakers and effective engagement with the Act by those in charge of its implementation. In the case of *Clerical Workers*, the dismissal of a pay equity claim created a widespread understanding that equal pay for work of equal value was not provided for in New Zealand's legislative framework. After the radical overhaul of New Zealand's labour framework to a decentralised free market, the high degree of investment required to achieve pay equity became incompatible with the social, economic and political interests of both employers and the Government.

The recent interpretation of section 3(1)(b) in the Equal Pay Act 1972 in *Terranova* redefined the scope of the Act through an interpretation that upholds the Act's anti-discriminatory purpose. A number of factors contributed to the success of the case including a trend of favourable judicial treatment of discrimination issues in employment, union support and stronger recognition of pay equity as a human right. The resulting evolution in perceptions has been a significant driver of a broad shift in approaches to pay equity.

Neither litigation nor new legislation are able to provide solutions to the social issue of pay equity in isolation however each continues to play a tangible role in an overall framework of change. As the different results achieved in the *Clerical Workers* and *Terranova* cases demonstrate, the courts play a core role in framing existing perceptions regarding the status quo and exposing a need for reform. With the decision in *Terranova*, the courts served its function in providing clarification and guidance on the scope and implementation of the Equal Pay Act. As a result of this reactivation of the Act, a new opportunity for meaningful reform has been presented by transforming the issue of pay equity into a legal problem that required proactive engagement.

In progressing forward, responsibility for enacting further reform that will achieve pay equity in New Zealand now rests with the Government. Shaped by the prevailing social attitudes, economic concerns, and political priorities on the part of the institutions that

control its instigation and implementation, the story of pay equity indicates that progress on law reform with a social goal will never be predictable nor clear cut. The reduction of the gender pay gap through the implementation of pay equity requires a socially adaptive legal response.

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